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In The

Supreme Court of the United States

October Term, 1995

GERALD D. BAIR, Director,
Iowa Department of Revenue and Finance,

Petitioner,

vs.

THE BURLINGTON NORTHERN
RAILROAD COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether an ad valorem property tax on residential, commercial and industrial real property, manufacturing machinery and equipment, computer equipment, motor vehicles, communication towers, and all property of centrally assessed utilities and transportation companies is generally applicable, allowing a State to remove all other personal property from taxation without violating § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") of 1976.

In *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), the Court held that there was jurisdiction for railroads to litigate their state ad valorem property tax valuations in federal court under § 306(1)(a) of the 4-R Act. In such actions, § 306(2)(d) provides that "the burden of proof with respect to the determination of . . . true market value shall be that declared by the applicable State law."

(2) Whether Congress, by "the applicable State law," meant: (a) the burden of proof generally applicable in a state civil proceeding; or (b) the burden of proof that would apply in a State ad valorem property tax adjudication of the true market value of a railroad.

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PETITION FOR WRIT OF CERTIORARI

Gerald D. Bair, Director of the Iowa Department of Revenue and Finance, respectfully petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (*App. A, p. 1a*) is reported as *Burlington Northern R. Co. v. Bair*, 60 F.3d 410 (8th Cir. 1995). The opinion of the district court (*App. B, p. 13a*) is reported as *Burlington Northern R. Co. v. Bair*, 815 F.Supp. 1223 (S.D. Iowa 1993). The district court's opinion (*App. C, p. 63a*) on plaintiff's motion for instruction and defendant's motion for reconsideration is reported as *Burlington Northern R. Co. v. Bair*, 837 F.Supp. 298 (S.D. Iowa 1993). The district court's Order for Judgment (*App. D, p. 75a*) is unreported. The opinion of the court of appeals (*App. E, p. 80a*) on Director Bair's interlocutory appeal from the grant of the preliminary injunction is reported as *Burlington Northern R. Co. v. Bair*, 957 F.2d 599 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 69 (1992). The district court decision (*App. F, p. 96a*) granting the preliminary injunction and the district court decision (*App. G, p. 99a*) on remand from the court of appeals are unreported. The order of the court of appeals (*App. H, p. 102a*) entered August 31, 1995, denying Director Bair's timely petition for rehearing and suggestion for rehearing *en banc* is not reported.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1). The court of appeals entered judgment July 6, 1995. Director Bair's timely petition for rehearing and suggestion for rehearing *en banc* was denied August 31, 1995. This petition was filed within 90 days of the court of appeals' denial of the petition for rehearing.

STATUTES INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54-55 (Feb. 5, 1976), codified with some language modifications[1] at 49 U.S.C. § 11503, provides, in relevant part:

> (1) . . . It is unlawful for a State . . . to commit any of the following prohibited acts:
>
> > (a) The assessment (but only to the extent of any portion based on excessive values as

[1] The changes on codification " 'may not be construed as making a substantive change in the laws replaced.' 92 Stat. 1466 § 3(a)." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, at 459 n.1 (1987). The language changes in the codification are significant on the issues involved in this case. For example, prior to codification § 306(2)(d) provided: "the burden of proof . . . shall be that declared by *the applicable* State law." (Emphasis added.) The codification at 49 U.S.C. § 11503(c) provides: "[t]he burden of proof . . . is governed by state law." Accordingly, further references in this petition are to the Public Law.

hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

. . . .

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . .

. . . .

(2) . . . [T]he district courts . . . shall have jurisdiction, . . . to grant such . . . equitable relief . . . as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that –

. . . .

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law;

. . . .

(3) As used in this section, the term –

. . . .

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, . . . which is devoted to a commercial or industrial use and which is subject to a property tax levy.

The complete text of § 306 (*App. I, p. 103a*) is provided in the appendix, along with the text of the codification (*App. J, p. 107a*) located at 49 U.S.C. § 11503.

STATEMENT OF THE CASE

The Court, in *Department of Revenue of Oregon v. ACF Industries, Inc.*, ___ U.S. ___, 114 S.Ct. 843 (1994), ("*ACF*"), held that States may exempt non-railroad property from a generally applicable ad valorem property tax without creating a cause of action under § 306(1)(d) of the 4-R Act.[2] This case raises the issue of whether other States

[2] Sections 306(1)(a) & (1)(c) of the 4-R Act prohibit assessment ratio and tax rate discrimination in ad valorem property taxes. Section 306(1)(d) of the 4-R Act prohibits "any other tax which results in discriminatory treatment of a common carrier by railroad." In *ACF*, the Court held that since §§ 306(1)(a) and 306(1)(c) prohibited tax discrimination in ad valorem property taxes, § 306(1)(d) applied to ad valorem property taxes, if at all, only when the tax was so riddled with exemptions that the tax was an ad valorem property tax in name only – or, in the terms of the statute, that the tax was now an "other tax." Oregon's exemptions of non-railroad personal property did not result in "discriminatory treatment" because discriminatory treatment was to be judged in comparison to the same defined comparison class of *taxable* commercial and industrial property as the ad valorem tax ratio and tax rate discrimination prohibitions appearing in §§ 306(1)(a) and (c). The comparison class being limited to taxable property, exemptions of non-railroad property from a generally applicable tax do not violate the prohibition on discrimination.

Oregon's ad valorem tax was found to be generally applicable, even though class-by-class exemption had removed two-thirds of all personal property in Oregon from the tax rolls. See Brief of Respondents at 14, 1993 W.L. 406579, *ACF*.

which tax the same proportions of real and personal property as Oregon may use a different legislative mechanism to remove from the tax rolls the same proportion of personal property as exempted in Oregon without violating § 306(1)(d).

1. This case arises from the factual background of Iowa's ad valorem property tax system, which is highly integrated. A unified tax is levied on a single taxable class of property, which, although denominated "real property," contains both real and personal property. Contrary to the Eighth Circuit's assertion that Iowa has "singled out for taxation all the personal property of railroads and a handful of interstate utilities," 60 F.3d at 413, there are other taxpayers who are taxed on personal property in Iowa. These other taxpayers are both more numerous than the railroads and pay significantly more in taxes than the railroads.

Commercial and industrial personal property denominated as taxable "real property" in Iowa includes: (i) water rights, IOWA CODE § 427A.1(a); (ii) ferry franchises, IOWA CODE § 427.13; (iii) lessee's interests in state lands, IOWA CODE § 427.15; (iv) computers, computer output microfilming devices and key entry devices, IOWA CODE § 427A.1(j); (v) manufacturing machinery and equipment, IOWA CODE § 427A.1(e); (vi) all property of centrally assessed utilities and transportation companies, IOWA

CODE § 427A.1(h);[3] (vii) rights to space above land, IOWA CODE § 427A.1(g); (viii) transmission towers and antennae, IOWA CODE § 427A.1(k); and, (ix) commercial and industrial motor vehicles, IOWA CODE § 321.109.

Iowa personal property taxed as "real property" (other than transportation and utility property and motor vehicles) for the 1989 tax year aggregated slightly more than $2 billion in assessed value. Defendant's trial exhibit A-160 (*App. K, p. 110a*). Utility and transportation property valued as a unit aggregated slightly more than $7.2 billion in assessed value, a considerable portion of which is personal property. (*App. K, p. 113a*). Overall Iowa taxable property exceeded $70 billion in assessed value and commercial and industrial real property exceeded $13 billion in assessed value. (*App. K, p. 113a*).

To facilitate comparison, the Court is asked to notice that Iowa's 1994 unit assessments of railroads in Iowa, including all real, personal, and intangible property, summed to approximately $541 million. This figure is not significantly different from the value that the railroads

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[3] All real, personal and intangible property of centrally assessed utilities and transportation companies is assessed by the Department of Revenue and Finance as a unit. No separate assessment of real, personal or intangible property is made. See Iowa Code §§ 428.24-428.29 and Chapters 433-438. This method of assessment has been approved since *State Railroad Tax Cases*, 92 U.S. 575 (1875). See also, *Adams Express Company v. Ohio State Auditor*, 165 U.S. 194 (1897), *reh. denied*, 166 U.S. 185 (1897). In addition, property used by such utilities or transportation companies but owned by others is assessed to the utility or transportation company as if it were owned by the utility or transportation company. Iowa Code § 427A.1(i).

would have been assessed in 1989 if all property had been included in their 1989 assessments.[4] The trial court held that somewhat less than half of Burlington Northern's value was tangible and intangible personal property.[5] (*App. D, p. 77a*). Thus, owners of non-utility commercial and industrial personal property (other than motor vehicles) in Iowa paid about eight times as much in taxes on personal property as all railroads in Iowa combined. When motor vehicles and other utility personal property are considered, railroads pay only a small fraction of the taxes on personal property in Iowa. When all taxable property is considered, railroads pay a minuscule portion of all ad valorem property taxes in Iowa.

2. The balance of personal property in Iowa was generally removed from taxation by legislative action, starting with a long term freeze on the personal property tax base and ending in removal of the remainder of the personal property from the rolls. "Effective on July 1, 1987, all taxes on personal property as defined in section 427A.1 are repealed. For assessment years beginning on or after January 1, 1986, personal property shall not be listed or assessed." IOWA CODE § 427A.10. When Iowa removed personal property from the rolls in 1986, only

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[4] For tax years prior to 1994, Iowa removed personal property from its assessments of railroads as a result of the decision in *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985).

[5] Petitioner argues that the split between railroad real and personal property is irrelevant since the comparison class is monolithic. However the breakout is provided to prevent a mismatch in the event the Court wishes to make a comparison between the personal property taxes paid by railroads and personal property taxes levied on other taxpayers.

about $2.7 billion in market value was removed. (*App. K, p. 113a*). This figure represents the 1973 personal property tax base that remained constant in the reported figures from 1977 to 1986 as a result of a freeze on the personal property assessment base. *See generally,* 1973 Iowa Acts Ch. 255; IOWA CODE § 427A.9; *Burlington Northern R. Co. v. Bair,* 766 F.2d 1222, 1224 (8th Cir. 1985).

3. The Eighth Circuit, below, segregated Iowa's tax system between assessment of real property and assessment of personal property, distinguishing between states that generally remove personal property from taxation except for specified taxable inclusions, such as Iowa, and states that generally tax personal property, but then exempt the majority of personal property, such as Oregon. The Eighth Circuit held the former to be a violation of § 306(1)(d), per se, and went on to hold that Iowa's general exemption of personal property rendered its personal property ad valorem tax not generally applicable:

> Although the Director argues that a failure to tax non-railroad property is the equivalent of granting an exemption, we find this contention specious in light of the fact that, unlike the Oregon tax scheme in ACF, *Iowa's scheme does not even impose a generally applicable tax on personal property.* As noted above, Iowa Code § 427A.10 repealed Iowa's personal property tax effective July 1, 1987. Thus, the granting of exemptions, whether discriminatory or otherwise, is not at issue in this case.

60 F.3d at 412-413. (Emphasis added.) As a result of its holding that the form of the removal precluded general applicability of Iowa's personal property tax, the Eighth

Circuit made no analysis of the amount of personal property which was classified as taxable "real property" in Iowa. The Eighth Circuit's segregation of Iowa's tax system into real and personal property components was purely hypothetical, since Iowa's ad valorem property tax is imposed on a single class of property, denominated "real property," but containing elements of both real and personal property.

4. In contrast, the Seventh Circuit, in *Burlington Northern R. Co. v. Wisconsin Dep't of Revenue*, 59 F.3d 55 (7th Cir. 1995), found Wisconsin's ad valorem property tax to be generally applicable by comparing the amount of taxes paid by railroads to the total of taxes paid by other commercial and industrial property owners. Since the railroads were found to have paid only a small fraction of Wisconsin's ad valorem property taxes, Wisconsin's tax was held to be generally applicable. Wisconsin's exemption of four-fifths of all personal property by value was held not to create a cause of action under § 306(1)(d).

5. Had the Seventh Circuit's test been applied to Iowa's ad valorem property tax, Iowa's tax would have been found to be generally applicable because railroads pay only a small fraction of Iowa's ad valorem property taxes. Although there is a distinction between the manner in which personal property is removed from taxation in Iowa and the manner in Wisconsin, there is no difference in the amount or kind of property removed from the tax rolls. Hence, the decisions of the Seventh and Eighth Circuits cannot be reconciled and there is a conflict among the Circuits as to the test to determine whether a State's ad valorem property tax is generally applicable.

6. This action was initiated in 1990, when the Burlington Northern Railroad Company, ("Burlington Northern") complained against Gerald D. Bair, Director of the Iowa Department of Revenue and Finance, ("Director Bair") in United States District Court for the Southern District of Iowa seeking an injunction against Iowa's collection of ad valorem property taxes for the 1989 tax year. Jurisdiction for the case was founded in § 306 of the 4-R Act. Section 306 of the 4-R Act creates an exception to the Tax Injunction Act, 28 U.S.C. § 1341, by granting federal jurisdiction for injunctive and declaratory relief from specified prohibited state taxation practices as they affect railroads.

7. After an eleven-day trial in October of 1992, the district court entered a judgment of permanent injunction, upholding several of Burlington Northern's claims. There were two significant holdings of the district court for purposes of this petition. The first was that the facts regarding railroad market value would be determined by the preponderance of the evidence and not according to Iowa's state law burden of proof in a contest over a railroad valuation, which is clear and convincing evidence. This holding was affirmed on appeal on slightly different grounds. "Thus, the burden of proof required by Iowa in the context of other valuation proceedings before the Director has no place in a case arising under § 11503." 60 F.3d at 414.

The second holding was that Iowa's tax system, which defines taxable property as "real property" with selected inclusions of commercial and industrial personal property and all property of companies assessed as a unit, discriminated against Burlington Northern within

the meaning of § 306(1)(d). The trial court held that Iowa could not assess Burlington Northern's personal property in Iowa and also reduced Iowa's assessment by removing two intangible assets: computer software and assembled work force. On Director Bair's appeal, the Eighth Circuit affirmed. This Petition followed.

REASONS FOR GRANTING THE WRIT

This case presents compelling issues for the Court to review. The Eighth Circuit's decision in this case conflicts with the Seventh Circuit's ruling in *Burlington Northern R. Co. v. Wisconsin Dep't of Revenue*, 59 F.3d 55 (7th Cir. 1995) on an issue of significant political and economic importance.[6] The Eighth Circuit's holding that Iowa's general removal from its ad valorem property tax base of personal property other than manufacturing machinery and equipment, computers, motor vehicles, transmission towers, and property assessed as a unit constitutes a violation of § 306(1)(d), is inconsistent with the Seventh Circuit's determination that Wisconsin's exemption of virtually all personal property but commercial machinery and equipment and property assessed as a unit, or about four-fifths of all personal property by value, did not

[6] The decision below also conflicts with the Court's determination in *ACF* that Oregon's tax system was generally applicable – judged on the basis of Oregon's combined real and personal property assessments – indicating that the Seventh Circuit's test for general applicability should be adopted in preference to the Eighth Circuit's test.

negate the general applicability of Wisconsin's ad valorem property tax. Deciding what constitutes a generally applicable tax is an issue that promises to consume judicial resources in the majority of districts and circuits, without unified resolution, unless further guidance is provided by the Court.

At least four other courts have considered the issue of what constitutes a generally applicable tax, with divergent results: *Atchison, Topeka & Santa Fe Ry. Co. v. State of Arizona*, 94-15850 (9th Cir., argued October 19, 1995) *on appeal from* CIV 93-549-PHX-RGS (D.Ariz. March 7, 1994) (*App. L, p. 115a*) (concerning the validity of Arizona's state and city/town transaction privilege tax); *Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995) (*App. M, p. 123a*) *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995) (prohibiting assessment of railroad software); *Ogilvie v. State Board of Equalization, State of N. Dakota*, 893 F.Supp. 882 (D. N.D. 1995) (prohibiting assessment of railroad personal property); *Burlington Northern R. Co. v. South Dakota Dep't of Revenue*, 94-3073 (D. S.D. June 26, 1995) (*App. N, p. 132a*) (prohibiting assessment of railroad personal property). Continued litigation of the issue will frustrate the judicial economy that timely guidance is intended to provide.

This case also presents a second conflict among the circuits. The Eighth Circuit, below, held that the proper burden of proof of market value of a railroad is the general civil case burden of proof in a state. (*App. A, p. 9a*) On this point the Tenth Circuit would appear to agree. *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495 n.4 (10th Cir. 1984). However, the Ninth Circuit has held that the burden of proof is the burden that would be

applied in an ad valorem property tax trial under state law. *Burlington Northern R. Co. v. Department of Revenue, State of Washington*, 23 F.3d 239 (9th Cir. 1994).

> Section 306(2)(d) of the Act, as recodified, provides that "[t]he burden of proof in determining assessed value and true market value is governed by state law." 49 U.S.C. § 11503(c). Under Washington law, the determination of the value of the property by public officials is presumed correct. RCW 84.40.0301(1). The presumption may be defeated only by evidence that is "clear, cogent and convincing." Id. The district court correctly applied this standard.

23 F.3d at 241. Resolution of this conflict is necessary to restore uniformity among the circuits.

ARGUMENT

I. CONGRESSIONAL INTENT MANIFESTED IN SECTION 306 PRECLUDES COMPARISON BETWEEN RAILROAD PROPERTY AND UNTAXED PROPERTY.

Sections 306(1)(a) and 306(1)(c) prohibit ad valorem tax ratio and rate discrimination, respectively. Discrimination is determined by reference to the defined comparison class of taxable commercial and industrial property. Where a meaningful comparison can be made on the basis Congress set forth, § 306(1)(d)'s general prohibition against "any other tax" which discriminates against railroads has no application to an ad valorem tax. The trial court, below, made the ratio of assessment comparison under § 306(1)(a). After the court adjusted the railroad

valuation, Iowa's ratio of assessment on Burlington Northern was within the allowable tolerance of the ratio of assessment for the comparison class, affording the railroad no grounds for relief. (*App. B, p. 58a*). Accordingly, there is no basis for § 306(1)(d) relief in Iowa.

II. IN THE EVENT OF DIFFICULTY DISCERNING CONGRESSIONAL INTENT, PRINCIPLES OF FEDERALISM GENERALLY COUNSEL THAT FEDERAL COURTS SHOULD ADOPT A HANDS-OFF APPROACH WITH RESPECT TO STATE TAX ADMINISTRATION.

Even if Congressional intent in enacting § 306 were difficult to discern, principles of federalism such as those reflected in the Tax Injunction Act, 28 U.S.C. § 1341, require that the federal courts avoid interfering with state tax policy choices. In *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, ___ U.S. ___, 115 S.Ct. 2351 (1995), the Court was faced with deciding whether Congress, in 28 U.S.C. § 1983, intended to create a cause of action affecting state taxation actions. The Court held that Congress did not, invoking long settled federalist principles:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

___ U.S. ___, 115 S.Ct. at 2354, quoting *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871).

A. *ACF* Mandates Construction of the 4-R Act to Minimize Interference with State Taxation.

> [T]axation authority of state government [is] an authority we have recognized as central to state sovereignty. When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. (Internal citations omitted.)

ACF, ___ U.S. at ___, 114 S.Ct. at 850.

One critical aspect of preserving state sovereignty is permitting States the freedom to craft their own approaches to designating certain properties for taxation while exempting or removing others from taxation. Congress did not intend the 4-R Act to restrict the *form* States used to remove property from taxation:

> Congress did not state whether exemptions are a form of forbidden discrimination against rail carriers, and further *did not provide a standard for courts to distinguish valid from invalid exemption schemes.*
>
> Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision.

___ U.S. at ___, 114 S.Ct. at 850. (Emphasis added.)

Contrary to these mandates, the Eighth Circuit, below, distinguished Iowa's tax system from Oregon's solely by the manner in which Iowa chose to remove personal property from taxation.

B. Unification of Real, Personal and Intangible Property in the Comparison Class (i) Minimizes Interference with State Tax Policy Prerogatives, (ii) is Mandated by the Plain Language of the Statute, and (iii) Derives Explicit Support from the Congressional History.

In *ACF*, the Court determined the general applicability of Oregon's ad valorem property tax with reference to Oregon's tax system as a whole. "Oregon imposes an ad valorem tax upon all real and personal property within its jurisdiction, except property granted an express exemption." ___U.S. at ___, 114 S.Ct. at 846. This analysis was so structured, despite the fact that Oregon, unlike Iowa, separately values personal property. See OR.REV.STAT. § 308.250. Further, the Oregon Department of Revenue separately values car lines, OR.REV.STAT. § 308.515(1)(a), as a unit, OR.REV.STAT. § 308.555 Oregon's unit includes all real and personal, tangible and intangible property. OR.REV.STAT. § 308.510. The car line property values so determined are then apportioned to the counties as statutorily defined "personal property." See OR.REV.STAT. § 308.510(3). Oregon's ad valorem tax is levied on the combination of all taxable property.

1. Minimizing Interference.

The Court determined the general applicability of Oregon's ad valorem property tax at the point of imposition, or levy, of the tax, not at any process or procedure leading to the levy of the tax, such as the determination of the value of personal property subject to taxation in

Oregon. This aspect of the *ACF* decision was ignored by the Eighth Circuit in the decision below.

In order to minimize interference with State tax policy choices, it is necessary to adopt a different approach than the Eighth Circuit's and restrict the determination of general applicability to the tax as a whole. If subclassification of State tax systems is allowed in the determination of general applicability, the overwhelming problem becomes one of where to stop. There are no statutory guideposts to limit the subclassification process. The result will inevitably be chaos, leading to determinations that State's ad valorem property taxes on locomotives, rolling stock, rails, ties and spikes are not generally applicable because few if any other taxpayers pay taxes on such property. In the short time since the *ACF* decision, the courts have taken many steps along this path. See, e.g., *Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995) (holding that Colorado violated § 306(1)(d) by exempting non-railroad software.)

2. Plain Language Mandate.

In *ACF*, the Court resolved the issue by incorporating into § 306(1)(d) the comparison class of commercial and industrial property defined at § 306(3)(c), which in plain language mandates combination: " 'commercial and industrial property' or 'all other commercial and industrial property' means *all* property, real or personal . . . which is subject to a property tax levy." (Emphasis added.) Thus, the Court's choice to use the combination of real and personal property to determine the general applicability of Oregon's ad valorem property tax flowed

directly from the plain language of the statute. The Court did not need to discuss the issue further.

3. Legislative History.

Congress' unification of real and personal property in the comparison class was intentional. States have long taxed railroad properties as a unit. *Porter v. Rockford, R. I. & St. L. R.*, 76 Ill. 561 (1874); *State Railroad Tax Cases*, 92 U.S. 575 (1875). The Congressional history of the 4-R Act reflects that Congress was aware of this historical feature of state taxation and went out of its way to avoid interference with this well-established assessment methodology. In *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984), the Tenth Circuit traced Congress' modification of the comparison class to insure that there was a fair comparison between railroads assessed as a unit and commercial and industrial properties:

> Although we recognize that § 306 is not a model of precision or clarity, we do not think Congress' inclusion of personal property in the definition of "all other commercial and industrial property" was purposeless or inadvertent. In a hearing on an earlier version of § 306, Senator Hansen of Wyoming questioned Philip Lanier, a railroad vice-president, about the fact that the proposed bill would permit a comparison of real property on one hand *and real and personal property on the other. State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. 43-45 (1969) (testimony of Philip Lanier, vice-president of the Louisville & Nashville

> Railroad Co.). Senator Hansen later introduced an amendment to S. 2289 that specifically included personal property in the definition of the type of property to which railroad property was to be compared. The Senate adopted the amendment. Cong.Rec. S. 2023 (daily ed. Jan. 30, 1970). All the successor bills to S. 2289 specifically included personal property in that definition. (Emphasis added.)

732 F.2d at 1502.

Thus, the decision of whether Iowa has a "generally applicable" ad valorem property tax must be made at the level of the levy of the tax – which is on a combined real and personal property basis.

III. THE SEVENTH CIRCUIT'S TEST FOR DETERMINING GENERAL APPLICABILITY FOLLOWS THE COURT'S *ACF* DECISION.

In line with the Court's decision in *ACF*, the Seventh Circuit determined whether Wisconsin's ad valorem property tax was generally applicable by judging how much of the total tax levied fell on the railroads. *Burlington Northern R. Co. v. Wisconsin Dep't of Revenue*, 59 F.3d 55 (7th Cir. 1995). If railroads had truly been singled out for taxation, then the taxes levied on them would be a significant fraction of the total tax base. This was not the case in Wisconsin:

> All these calculations of percentages of exempted property are, however, beside the point. After *ACF Industries*, exempt property is not part of the comparison class, so that arguing about levels of exemption gets one nowhere.

> The railroads can only succeed by showing that the actual tax levied is a general tax in name only and is in fact a tax on railroads. The only number relevant to that inquiry is the percentage of the total tax levy that falls on railroads. No matter how one defines the "total tax," and the parties dispute whether it should include both real and personal or just personal property, the numbers themselves are uncontested and fatal to the railroads' claim. During the relevant years, 1988-1992, the tax levy on railroad property was less than .3 percent of the total property tax levy; less than 1 percent of the property tax levy on other commercial and industrial property; and less than 5 percent of the levy on other commercial and industrial personal property.

59 F.3d at 58. (Footnotes omitted.) The figures for Iowa are not distinguishable. Accordingly, Iowa should not be treated as violating § 306(1)(d).

IV. IN CONTRAST, THE EIGHTH CIRCUIT'S TEST FOR GENERAL APPLICABILITY DEPARTS FROM *ACF* BY USING THE WRONG COMPARISON CLASS.

The *ACF* Court's construction of property "subject to a property tax levy" as "taxed" property invalidates the Eighth Circuit's proposed distinction between this case and *ACF*. That Iowa chose to generally remove personal property from taxation and then reclassified significant elements of personal property as taxable "real property" does not serve as a basis for distinguishing Iowa's tax

system from Oregon's or Wisconsin's. The required comparison is made to "all property, real or personal, . . . subject to a property tax levy." Section 306(3)(c). So long as this comparison is meaningful, the fact that other property is untaxed should be irrelevant. The manner chosen by the legislature to effect this removal cannot serve as a guidepost in determining discrimination:

> Congress qualified the definition of "commercial and industrial property" further, limiting the comparison class to property "subject to a property tax levy." 49 U.S.C. § 11503(a)(4). The statute does not define this phrase, which on its face could bear one of two interpretations: (1) taxed property; or (2) taxable property, a broader category consisting of the general mass of property within the State's jurisdiction and power to tax, including property that enjoys a current exemption.
>
> The first interpretation has been the subject of some criticism, see *Western Air Lines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 135, 107 S.Ct. 1038, 1045, 94 L.Ed.2d 112 (1987) (White, J., concurring), but we believe it follows from the way Congress used identical language elsewhere in § 11503. Section 11503(c) confers jurisdiction upon United States district courts to enforce the terms of § 11503(b) despite the bar otherwise imposed by the Tax Injunction Act, 28 U.S.C. § 1341. Subsection (c)(1) grants district courts the power (under certain circumstances not pertinent here) to prohibit "an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed

> value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property."

___ U.S. at ___, 114 S.Ct. at 848, 849.

The Court then concludes this analysis by making the point, critical to this case, that the comparison to determine discrimination is between railroad property and "taxed property":

> In the context of this provision, which concerns the differential assessment of taxed property, the words "property subject to a property tax levy" must mean "taxed property." Given the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning, that phrase must carry the same meaning in subsection (a)(4), where it qualifies the definition of "commercial and industrial property."
>
> All this bears on the case before us. *Because property "subject to a property tax levy" means property that is taxed,* the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which discrimination is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions.

___ U.S. at ___, 114 S.Ct. at 849. (Emphasis added, footnote, internal quotes and citations omitted.)

The Court then incorporates the same comparison when determining whether a state has subjected a railroad to discriminatory treatment under § 306(1)(d). The Court put a single qualification on its holding by noting that if exemptions rendered railroads effectively the only properties susceptible to such a tax then the tax might no longer be considered an ad valorem property tax. In such a case the preclusive effect of §§ 306(1)(a) and 306(1)(c) rate and ratio regulation would not operate and exemptions could constitute discrimination. The Court did not say how to determine when an ad valorem property tax crossed over from being "generally applicable" to discriminatory. This discussion was unnecessary because the Court found Oregon's ad valorem tax to be generally applicable.

Textual analysis of the Act provides the guide the Court did not supply for determining whether other States' ad valorem property taxes are generally applicable. This analysis significantly favors adopting the Seventh Circuit's test for general applicability in preference to the Eighth Circuit's test. Congress made explicit provision for the possibility that States might exempt such significant parts of the commercial and industrial property comparison class that no meaningful comparison could be made. Section 306(2)(e) provides that if an assessment ratio cannot be established for the commercial and industrial comparison class, then all taxable property becomes the substitute comparison class. For example, consider the case of a State that taxes only residential real property and railroad property. If an assessment ratio can be determined for the residential real property and the

railroads are assessed at that ratio, exemption of all commercial and industrial property would not result in a violation of §§ 306(1)(a) and 306(1)(c). The railroads are taxed no differently than the substitute comparison class. *ACF* holds that § 306(1)(d) should not be read to disallow that which is specifically allowed under §§ 306(1)(a) and 306(1)(c). Thus, no violation of § 306(1)(d) has occurred as a result of exempting all commercial and industrial property. Clearly, then, a state may also remove all commercial and industrial personal property from the rolls without violating § 306(1)(d).

This is not to say that property subject to tax by state statute but simply not assessed and property that is misvalued are beyond the reach of the Act. Congress was made aware of the distinction between legislative action and assessing failure as modes which removed property from the rolls.

David B. Walker, Acting Executive Director of the Advisory Commission on Intergovernmental Relations, brought this issue before Congress when he testified in opposition to the breadth of S. 2289 in *Common & Contract Carrier State Property Tax Discrimination: Hearings Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639 and S. 2289*, No. 91-61 (91st Cong., 2nd Sess., June 9, 1970), p. 2:

> As long as these differential tax burdens are hammered out in the open legislative arena – and not "negotiated" behind the closed door of the assessor's office – only the requirements of due process are needed as a safeguard against

any arbitrary and unreasonable legislative classification.

Iowa's removal of certain personal property from the ad valorem tax rolls was accomplished by legislative action. Thus, untaxed personal property is not in the comparison class and may not be used to determine whether railroads are the victims of discrimination under § 306(1)(d).

V. CLASSIFICATION OF RAILROAD PROPERTY FOR TAXATION DOES NOT VIOLATE SECTION 306(1)(d).

The Eighth Circuit and the district courts which have considered the issue appear to read *ACF* to reserve the issue of whether classification of railroad property for taxation that would otherwise be exempt if owned by a different taxpayer constitutes prohibited discrimination under § 306(1)(d). This reading is wrong because the issue was resolved in favor of Oregon in *ACF*. One of the Oregon exemptions at issue in *ACF* was "agricultural products *in the possession of farmers*." 114 S.Ct. at 846. (Emphasis added.) Railroads or car lines holding agricultural products were denied the exemption based solely on their status. Nevertheless, the Court approved taxation of the car lines in Oregon and did not extend the benefits of the agricultural products exemption to the car lines.

The Court also noted with approval the preservation of other State exemptions pre-existing the enactment of § 306: "Given the prevalence of property tax exemptions when Congress enacted the 4-R Act, § 11503's silence on

the subject – in light of the explicit prohibition of tax rate and assessment ratio discrimination – reflects a determination to permit the States to leave their exemptions in place." ___ U.S. at ___, 114 S.Ct. at 850. One of these exemption statutes was VT.STAT.ANN., Tit. 32, § 3802 (1959), exempting tools and implements *possessed by mechanics and farmers,* and highway-building equipment. The Court explicitly approved Vermont's classification taxing railroads on property which in the hands of other taxpayers would be exempt. Similar examples appear among the other pre-existing state exemptions statutes approved and preserved by the Court in *ACF.*

VI. THE NINTH CIRCUIT CORRECTLY INTERPRETED THE "APPLICABLE" BURDEN OF PROOF TO BE THE BURDEN OF PROOF THAT WOULD APPLY IN A STATE ADJUDICATION OF THE AD VALOREM TAX VALUE OF A RAILROAD.

The conflict between the Eighth and Tenth Circuits on the one hand and the Ninth Circuit on the other as to which burden of proof to apply in an adjudication of a railroad value under § 306(1)(a) is easily resolved in favor of the Ninth Circuit's holding. Section 306(2)(d) mandates reference to the "applicable" state law burden of proof in determining the fair value of railroad property. "Applicable" is susceptible to only one reasonable construction.

Congress would not have gone out of its way to specify the state law burden of proof had it intended the general civil burden of proof to apply, since no action would have incorporated the identical federal general civil burden of proof – a preponderance of the evidence.

Thus, the Eighth Circuit's construction of "applicable" state law to mean the general civil burden of proof violates the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *ACF*, ___ U.S. at ___, 114 S.Ct. at 848, quoting *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 at 249 (1985).

CONCLUSION

The Court should issue the writ of certiorari to the United States Court of Appeals for the Eighth Circuit and entertain full briefing and argument. The Court may also wish to consider summary reversal.

Respectfully submitted.

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APPENDIX A

BURLINGTON NORTHERN RAILROAD COMPANY, INC.,

Appellee,

v.

Gerald D. BAIR, Director of Iowa Department of Revenue,

Appellant.

No. 93-4029.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 10, 1994.

Decided July 6, 1995.

Rehearing and Suggestion for Rehearing En Banc Denied Aug. 31, 1995.*

C.A. Daw, Boise, ID, argued, for appellant.

James W. McBride, Washington, DC, argued (Richard A. Malm, Des Moines, IA, Stephen D. Goodwin, Memphis, TN, and Thomas H. Catalano, Ft. Worth, TX, on the brief), for appellee.

Before McMILLIAN, Circuit Judge, McKAY,** Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

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* Magill, Circuit Judge, took no part in the consideration or decision of this case.

** The HONORABLE MONROE G. McKAY, Senior United States Circuit Judge for the Tenth Circuit, sitting by designation.

Burlington Northern Railroad Company (BN) brought this action against Gerald D. Bair, Director of the Department of Revenue and Finance of the State of Iowa (Director), seeking relief from discriminatory Iowa property taxes for the 1989 assessment year under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act," codified at 49 U.S.C. s 11503) (1988). The District Court[1] granted relief and the Director appeals. We affirm the judgment of the District Court.

I.

Since 1976, state property tax schemes, such as Iowa's, have been subject to the 4-R Act, which prohibits the discriminatory taxation of railroads. See *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857, 95 L.Ed.2d 404 (1987). The portion of the 4-R Act that is pertinent to this case reads as follows:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> > (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial

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[1] The Honorable William C. Stuart, Senior United States District Judge for the Southern District of Iowa.

> property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation. . . .

49 U.S.C. s 11503(b)(1)-(4).

Iowa does not generally tax personal property, its personal property tax having been repealed effective July 1, 1987. See Iowa Code Ann. § 427A.10 (West 1990) (repealed 1994). Rather, Iowa imposes a property tax only on "real property" as defined by § 427A.1 of the Iowa Code. Section 427A.1 generally defines real property to include land, buildings and fixtures, and certain manufacturing machinery and computers. However, Iowa has denominated as real property all property of railroads and certain utilities, whether that property is in fact real or personal, tangible or intangible.[2] The totality of a

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[2] Specifically, all personal property of public utilities, telephone and telegraph companies, railroads, express companies, electric companies and pipeline companies is taxable as "real property." See, respectively, Iowa Code Ann. §§ 428.26; 433.4; 434.15; 436.7; 437.13; 438.13.

railroad's "real property," as defined by s 427A.1, is centrally assessed by the Director and part of the resulting "unit value" is apportioned to Iowa. After various adjustments are made, the property then is subjected to taxation.

In prior litigation between the Director and BN, this Court held that under subsection (b)(4) Iowa was prohibited from treating BN's personal property as real property and thus depriving BN of various rollbacks and credits that were applicable to the personal property tax prior to its repeal. *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222, 1224 (8th Cir.1985) (Bair I). In the present case, the District Court found that the Director's assessment of BN violated the 4-R Act and enjoined the Director from (1) assessing BN's real property at an assessed-value-to-true-market-value ratio exceeding the same ratio for other Iowa commercial and industrial real property in violation of section (b)(1); (2) adding the value of leased operating equipment to BN's unit value; (3) using a capitalization rate in the income approach to valuation lower than fourteen percent; and (4) taxing the value of certain BN intangible personal property (its computer software and assembled work force) in violation of section (b)(4).

In this appeal, the Director claims that following the Supreme Court's decision in *Department of Revenue of Oregon v. ACF Indus.*, ___ U.S. ___, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994),[3] district courts are barred from considering subsection (b)(4) discrimination claims that are

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[3] This decision was handed down during the pendency of the Director's appeal prior to briefing.

based on a state's grant of tax exemptions to certain taxpayers but not to others. Accordingly, the Director argues that the portion of the District Court's order which enjoins taxing the value of certain BN intangible personal property on the basis of a pre-*ACF* interpretation of subsection (b)(4) should be vacated. In addition, the Director claims that the District Court committed several errors in revising Iowa's valuation of BN's property under § 11503(b)(1).

II.

We address first the Director's assertion that the Supreme Court's recent decision in *ACF* transformed the 4-R Act landscape by barring exemption discrimination claims raised under § 11503(b)(4). The Director asserts that under *ACF*, the States are vested with plenary discretion to grant tax exemptions and that discrimination claims arising from such exemptions are not cognizable under subsection (b)(4). In the Director's view, Iowa's exemption from taxation of virtually all non-railroad personal property and its imposition of tax on the intangible personal property of only railroads and certain interstate utilities, was merely an exercise of the state's discretion. Accordingly, the Director contends that Iowa's tax scheme is permissible under *ACF*. We disagree.

In ACF, the State of Oregon had imposed an ad valorem tax upon all real and personal property within the state. 114 S.Ct. at 846. Oregon expressly exempted some property from the tax, including livestock, certain agricultural products and machinery, and nonfarm business inventories. Id. Because railroad cars were not

among the exempted items, ACF Industries, a company involved in leasing railroad cars to railroads and shippers, challenged Oregon's tax and the grant of exemptions as "another tax that discriminates against a rail carrier" in violation of subsection (b)(4) of the 4-R Act. Id. at ___-___, 114 S.Ct. at 846-47. The Supreme Court upheld Oregon's tax scheme, holding that "a State may grant exemptions from a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under the relevant provision of the 4-R Act." Id. at ___, 114 S.Ct. at 846; see also, id. at ___, ___, ___, 114 S.Ct. at 848, 850, 852. Having carefully reviewed the Supreme Court's decision in *ACF*, we conclude that the facts of the present case differ substantially from those found in *ACF*, and that ACF does not bar BN's claim.

We note at the outset that contrary to the Director's assertion, BN's claim cannot accurately be characterized as an exemption discrimination claim. Although the Director argues that a failure to tax non-railroad personal property is the equivalent of granting an exemption, we find this contention specious in light of the fact that, unlike the Oregon tax scheme in *ACF*, Iowa's scheme does not even impose a generally applicable tax on personal property. As noted above, Iowa Code § 427A.10 repealed Iowa's personal property tax effective July 1, 1987. Thus, the granting of exemptions, whether discriminatory or otherwise, is not at issue in this case. Even if we were dealing with exemption discrimination, unlike the tax at issue in *ACF*, the tax which Iowa seeks to impose on railroads and a handful of other interstate concerns is, as we already have observed, not "generally applicable,"

a shortcoming that we conclude makes ACF inapposite here. While there is considerable disagreement between the parties as to the full import of *ACF*, we believe the Supreme Court's holding is best summed up in its statement, repeated three times in substantially the same language, that "[section] 11503 [(b)(4)] . . . does not limit the States' discretion to exempt non-railroad property, but not railroad property, from ad valorem property taxes of general application." *ACF*, ___ U.S. at ___, 114 S.Ct. at 852 (emphasis added), see also id. at ___ and ___, 114 S.Ct. at 846 and 848. To understand the reach of the *ACF* holding, it is necessary to observe the inverse relationship between the term "exempt" and the phrase "general application." Practically speaking, if a state exempts sufficient property from a particular property tax, that tax no longer can be said to be one of general application. It follows that in the granting of tax exemptions, *ACF* permits the States something less than the unfettered discretion for which the Director argues. See *Ogilvie v. State Bd. of Equalization of the State of North Dakota*, No. 83-80-1334, Mem. & Order at 5-7, 1995 WL 500472 (D.N.D. June 9, 1995). Were it otherwise, the anti-discrimination purpose of the 4-R Act could utterly be eviscerated by a state that ostensibly imposed a tax of general applicability but then systematically exempted all but a targeted few taxpayers.

The Supreme Court recognized this dilemma and addressed the contention that its interpretation of section 11503(b) "prohibits discrimination of a mild form, but permits it in the extreme," ___ U.S. at ___, 114 S.Ct. at 851, by carving an exception from its holding. The Court noted that "[ACF] is not a case in which the railroads – either alone or as part of some isolated and targeted

group – are the only commercial entities subject to an ad valorem property tax." Id. The Court further stated that "[i]f such a case were to arise, it might be incorrect to say that the State 'exempted' the nontaxed property. Rather, one could say that the State had singled out railroad property for discriminatory treatment." Id.

We conclude that Iowa's tax scheme fits within the narrow exception left open by the Supreme Court in *ACF*. Here, we believe Iowa has singled out for taxation all the personal property of railroads and a handful of interstate utilities, while leaving untaxed most of the personal property of every kind, and all the intangible personal property, of the vast majority of commercial and industrial enterprises in the state. The Supreme Court refrained specifically, in *ACF*, from deciding whether subsection (b)(4) would apply in such a case. Id. at ___, 114 S.Ct. at 852; see also *Ogilvie*, Mem. & Order at 4-7, 1995 WL 500472. We hold that in the circumstances here, subsection (b)(4) does apply to prohibit Iowa from taxing the intangible personal property of railroads since Iowa imposes this tax upon only a small, targeted group of businesses. Accordingly, we affirm that portion of the District Court's order enjoining the Director from taxing the value of BN's intangible personal property, namely BN's computer software and the value of its assembled work force.

We turn next to the Director's various claims of error by the District Court in revising Iowa's valuation of BN's property under section 11503(b)(1).

III.

The Director contends that the District Court erred by requiring BN to prove only by a preponderance of the evidence, rather than by clear and convincing evidence, that BN's valuation of its property was correct. Section 11503(c) provides that the burden of proof in determining assessed value and true market value is governed by state law. We held in Bair I that under Iowa law BN bears the burden of showing "by a preponderance of the evidence what the accurate values are," because that standard is the one generally applicable to civil proceedings. 766 F.2d at 1226. See also *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 732 F.2d 1495, 1500 n. 4 (10th Cir.1984) (applying preponderance of the evidence standard based on Kansas law).

The Director continues to press the argument we rejected in Bair I that the appropriate burden of proof in cases brought under subsection (b)(1) is clear and convincing evidence. As we stated in Bair I, "an action under [§ 11503] is based on alleged discrimination and is not intended to be a review of an administrative valuation determination." Id. at 1226. Thus, the burden of proof required by Iowa in the context of other valuation proceedings before the Director has no place in a case arising under § 11503. We conclude that the District Court did not err in requiring BN to prove the correct valuation of its assets by a preponderance of the evidence.

IV.

The Director also contends that the District Court erred in admitting BN's Exhibit 240C, a purported summary of BN's unit values as determined by other states.

The Director contends that the exhibit was (1) inadmissible as a summary under Federal Rule of Evidence 1006; (2) inadmissible hearsay; and (3) evidence of compromise barred by Rule 408. We expedite our consideration of the Director's argument by assuming, without deciding, that admission of Exhibit 240C was improper for each of the reasons asserted by the Director. Nevertheless, "[e]rror may not be predicated upon a ruling which admits. . . evidence unless a substantial right of the party is affected." Fed.R.Evid. 103(a). Accordingly, we will reverse the District Court only if the Director's substantial rights were affected. We conclude that they were not. The Director argues that admission of Exhibit 240C "significantly influenced" the District Court's valuation of BN. Director's Brief at 20. Having reviewed the District Court's ruling and order, we disagree. After devoting no less than fifteen pages to an analysis of the valuation of BN, the District Court in a footnote confessed to deriving "some comfort from the fact that this determination of fair market value is well within the range determined by seven other midwestern states." *Burlington Northern R.R. Co. v. Bair*, No. 4:90CV-60406 Ruling and Order at 27 n. 10 (S.D. Iowa March 7, 1993). This statement suggests that the influence of Exhibit 240C on the District Court fell far short of "significant." We are satisfied that the District Court would have reached the same conclusion regarding BN's value whether or not it considered Exhibit 240C. Inasmuch as the Director has not shown any prejudice to his substantial rights as a result of the District Court's admission of Exhibit 240C, the Director's claim must fail.

V.

The Director challenges the capitalization rate used by the District Court in determining BN's value under the income approach. The Director argues that the capitalization rate adopted by the District Court resulted from application of an improper burden of proof and an improper consideration of Exhibit 240C. Because we have already concluded that the District Court applied the correct burden of proof and was not significantly influenced by Exhibit 240C, the Director's claim is without merit.

VI.

The Director next argues that the District Court erred in enjoining the Director from assessing to BN the owner's interest in leased operating property. The Director contends that under Iowa law, tax on the value of leased operating property – in this case locomotives, railcars and computers – must be borne by the lessee-railroad rather than the owner of such property. We agree. However, the District Court found that the tax on leased operating property already was assessed to BN because the value of that leased operating property was included in BN's unit value as determined by the Director. Having reviewed the record, we are satisfied that the District Court's finding is not clearly erroneous. See Fed.R.Civ.P. 52(a). Accordingly, the District Court's order enjoining the Director from re-assessing the value of BN's leased operating equipment is proper and is consistent with Iowa law.

VII.

We have carefully considered the Director's remaining arguments and find them to be without merit. The judgment of the District Court is affirmed.

APPENDIX B

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

Gerald D. BAIR, Director of the Department of Revenue and Finance of Iowa,
Defendant.

No. 4:90-CV-60406.
United States District Court,
S.D. Iowa, C.D.
March 9, 1993.

Richard A. Malm, Dickinson & Throckmorton, Des Moines, IA, Stephen D. Goodwin, Memphis, TN, James W. McBride, Washington, DC, for plaintiff.

Charles Arthur Daw, Chandler Dillion & Allyn, Boise, ID, James D. Miller, Atty. Gen., Des Moines, IA, for defendant.

RULING AND ORDER

STUART, Senior District Judge.

The Burlington Northern Railroad Company (BN or the railroad) brings this action under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (s 306 or 4-R Act), codified at 49 U.S.C. § 11503, against Gerald Bair, the Iowa Director of Revenue and Finance (Director), seeking relief from alleged discriminatory real property taxes for the 1989 assessment year. Section 306 prohibits the imposition of any discriminatory tax on railroads or rail property, confers federal

court jurisdiction and creates an express federal injunctive remedy to enforce such prohibition.[1]

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[1] The Act, 49 U.S.C. § 11503, provides in part:

(a) In this section –

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

These same parties were involved in similar litigation in this court for tax years 1981 and 1982.[2] After remand from the Eighth Circuit Court of Appeals, 766 F.2d 1222 (8th Cir.1985), this court, in an effort to determine the fair market value of BN's real property in Iowa, stated several principles to guide the parties in making necessary computations. The cases were settled without further litigation. Both parties claim to rely in this litigation upon those principles set forth by the court.

BN claims that the taxes assessed against it by the State of Iowa for the tax year 1989 violate section 306 in four respects:

A. The Director overvalued BN in violation of section 306(1)(a);

B. The Director undervalued comparative commercial and industrial property in violation of section 306(1)(a);

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law.

[2] *Burlington N. R.R. v. Bair*, 584 F.Supp. 1229 (S.D.Iowa 1984) (hereafter *Bair I*), aff'd in part, 766 F.2d 1222 (8th Cir.1985) (hereafter *Bair II*), on remand, 648 F.Supp. 91 (S.D.Iowa 1986) (hereafter *Bair III*).

C. The Director improperly apportioned BN's value between real and personal property resulting in BN being assessed on tangible personal property in violation of section 306(1)(d);

D. The Director improperly taxed BN's intangibles compared with other commercial and industrial intangibles in violation of section 306(1)(d).

The Director denies that BN was discriminated against in any way by the real property tax imposed on BN by the State of Iowa.

Several factors combined make the resolution of these claims complex and difficult. Although the parties agree that BN should be valued on a business enterprise basis as a unit, and they agree on the portion of that value assignable to the State of Iowa, the Director valued BN's rail transportation property at $4.9 billion while BN claims its true market value did not exceed $2.5 billion. The court must arrive at its own true market value. Because Iowa does not tax most of the personal property in the state, it is necessary to determine what portion of BN's true market value assigned to Iowa is personalty. It must also be determined whether intangible personal property is actually taxed in Iowa, and if not, what can be considered intangible personalty and its value. The court must also determine what value the intangibles contribute to the true market value of BN's Iowa property. According to the Eighth Circuit Court of Appeals, it is the responsibility of this court to weigh the evidence and make its own factual findings regarding valuations. *Bair II*, 766 F.2d at 1225-26. A formidable task. Because of the number of issues and the length and complexity of this

opinion, the court believes that it would be helpful if an outline of the opinion is included. Therefore, such outline follows.

I.

BURDEN OF PROOF

II.

OVERVALUATION OF BURLINGTON

A. "Method" or "Application"
B. Discounted Cash Flow
C. Income Capitalization Indicator
   1. Unrealistic Income Stream
   (a)
   Single year NROI
   (b)
   Accounting change
   (c)
   Add-back deferred taxes
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   2. Appropriate Capitalization Rate
   (a)
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   Proportion of debt capital to equity capital
   (d)
   Computation of discount or capitalization rate
   3. Computation of Value Using Income Capitalization Indicator
D. Stock and Debt Indicator
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III.

TANGIBLE PERSONAL PROPERTY BREAKOUT

IV.

INTANGIBLE PERSONAL PROPERTY DEDUCTION

A. Taxation of Commercial and Industrial Intangibles
B. Value of Intangible Assets

V.

EQUALIZATION

A. Assessment Jurisdiction
B. Commercial and Industrial Assessment Ratio

VI.

SUMMARY

I. BURDEN OF PROOF

The burden is on BN, as the party attacking the accuracy of the Director's values, to show by a preponderance of the evidence what the accurate values are. See *Michigan Wis. Pipe Line Co. v. Iowa State Bd. of Tax Review*, 368 N.W.2d 187 (Iowa 1985) (burden of proof does not shift from taxpayer). In evaluating the evidence, the district court should give due deference to the Director's expertise in valuation. Because there is no intent element in section 306, "Burlington Northern need only prove the accurate values, not purposeful undervaluation or overvaluation." *Bair II*, 766 F.2d at 1226.

II. OVERVALUATION OF BURLINGTON NORTHERN

A. "Method" or "Application"

In Iowa, as in most states, railroads' operating property is valued for property tax purposes as a unit. Under the unit concept of value, the fair market value of railroad operating property is measured by appraising the whole property as a going concern because it derives its true value not from the sum of its parts, but from the integrated use of the parts to carry traffic, render public service, and from the investors standpoint, generate income. In determining the true market value of BN as a unit, the Director used the stock and debt and the capitalized income approaches. These traditional approaches are widely accepted and used by appraisers, and they were used by BN in the prior litigation. BN now claims, however, that these methods are defective and that BN's true market value should be determined by using only the discounted cash flow (DCF) method.

The first issue before the court is:

> [W]hether a railroad may, in an action under [s 306] challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the States preferred accounting methods were applied.

Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 463 n. 5, 107 S.Ct. 1855, 1861 n. 5, 95 L.Ed.2d 404 (1987).

The Supreme Court expressed no view on that issue. Id. The issue was later presented to the Eighth Circuit

Court of Appeals in *Burlington N. R.R. v. James*, 911 F.2d 1297 (8th Cir.1990), but the court avoided the issue by assuming it had no jurisdiction under section 306 to hear a challenge to valuation methodology. The court held:

> The stipulation between the parties at least arguably framed the issue as one involving application of an accepted methodology. Certainly BN's claim to that effect is sufficient to survive the jurisdictional hurdle. Id. at 1301.

The court also stated:

> We recognize that our holding is not trouble-free. The parties agree that in cases like this the line between "methodology" and "application" is so thin as to be almost ephemeral. The district court obviously believed that, despite the parties' characterization of the issue, it would be required to weigh competing methodologies were it to determine the merits. That belief may or may not prove to be true. BN, however, unquestionably has presented a colorable allegation that the methodology used by Minnesota has resulted in a discriminatory tax. That allegation alone is sufficient to establish subject matter jurisdiction.

Id. This issue thus remains one of first impression in the Eighth Circuit.

In *James*, Judge Rosenbaum, considered BN's position as seeking "to have [the trial] court compel the State of Minnesota to use [BN's] alternative valuation method in lieu of the state's accounting method." *Burlington N. R.R. v. James*, 725 F.Supp. 1058, 1063 (D.Minn. 1989), rev'd on other grounds, 911 F.2d 1297 (8th Cir. 1990). He found

"subject matter jurisdiction to be limited to a determination of whether there is a rational basis and non-discriminatory purpose underlying the State of Minnesota's valuation methodology." Id., 1063-64.

I, like Judge Rosenbaum, find Judge Jenkins' analysis of that issue in *Union Pac. R.R. v. State Tax Comm'n*, 716 F.Supp. 543, 553 (D.Utah 1988) persuasive.

> Congress did not intend 'for the federal courts to become involved in establishing . . . procedures for the states in valuing railroads.' [*Burlington N. R.R. v. Lennen*, 573 F.Supp. 1155, 1164 (D.Kan.1982)]. . . . It is one thing to say that the 4-R Act allows federal courts to review railroads' claims of overvaluation. It is quite another to say that the Act dictates a state's choice of valuation methods. The 4-R Act may provide relief if a state overvalues a railroad by misapplying its chosen methodology or by using a methodology that has no rational basis or is chosen for the purpose of overvaluing railroads.

In *Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 533 (4th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1577, 118 L.Ed.2d 220 (1992), the railway brought an action under section 306 challenging the State of Virginia's "over the fence" method of valuing railroad property and arguing for use of the unit method. The Fourth Circuit stated:

> We conclude that § 306 does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property. The statute simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value

> property. In light of Congress' expressed preference against federal interference in state taxation policy, we believe that § 306 should be read narrowly, authorizing challenges to a state's calculation of fair market value, but not to a state's method for calculating such value. If Congress determines that one valuation methodology produces more accurate values than another, it may require states to utilize that accounting method. Section 306, however, does not authorize the courts to perform that task. In § 306, Congress has insured that railroad and non-railroad property will be treated similarly under whatever valuation methods have been selected by a given state. If the Congress further desires to standardize the valuation side of the taxation process, it could set out the methodologies it thinks are fairest to railroads. The courts, however, cannot make that judgment without completely displacing the fact-finding and policymaking powers of state government. The 4-R Act does not authorize the judiciary to undertake the difficult, and arguably impossible, task of determining which specific assessment methodology produces true market value of railroad property. Consequently, we affirm the order of the district court granting summary judgment.

Id.; see also *Richmond, Fredericksburg, & Potomac R.R. v. Forst*, 797 F.Supp. 494 (E.D.Va.1992) and *Burlington N. R.R. v. Department of Revenue*, Nos. C89-518(T)WD, C90-5417(T)WD, 1992 WL 201947 (W.D.Wash. Aug. 13, 1992).

The court has found no cases indicating that there is jurisdiction in this court to order taxing authorities to use

a specific accounting method to determine values.[3] BN relies on the Eighth Circuit's statement in *James*, 911 F.2d at 1301, that the difference between methodology and application "is so thin to be almost ephemeral," to argue that the stock and debt, capitalized income, and discounted cash flow approaches are "applications", not "methods". The court does not agree. All three methods of valuing property as a going business are widely accepted. Both BN and the Director used stock and debt and capitalized income in arriving at their true market values of BN's railroad property in *Bair III*. Now BN argues that the DCF approach is the only proper approach to use in arriving at the true market value of the railroad property.

> The appraisals are theoretical and based on assumptions and estimates that are at best, educated guesses. Experts agree that comparable sales provide the best way to appraise property. But if comparable sales are not available, as is the case with railroads, appraisers do the best they can with the information available to them.
>
> Each method may represent what some buyers and sellers actually do. All the methods may be equally rational given their underlying assumptions. And they are all irrational if pressed to extremes. . . . Each method or theory

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[3] The cases cited by Chesapeake in its Petition for Certiorari on this point at p. 13 do not hold that the federal courts can require the states to use a specific methodology in valuing railroad property. *CSX Transp., Inc. v. Forst*, 777 F.Supp. 435, 442-43 (E.D.Va.1991), is to the contrary. The arguments made by BN here were included in Chesapeake's petition and certiorari was denied, ___ U.S. ___, 112 S.Ct. 1577, 118 L.Ed.2d 220 (1992).

> depends on certain assumptions that cannot ultimately be proved or disproved by reason alone nor replicated in experience. Thus, this court cannot say that any one method is necessarily more rational than any other. Nor can the court say that one method alone arrives at the railroad's 'true market value.' Rather, the evidence suggests that the term true market value is a judgment not subject to mathematical precision that is based on a wide variety of factors and is at best an approximation.

Union Pac. R.R. v. State Tax Comm'n, 716 F.Supp. at 555. The line between method and application may at times be "ephemeral". Nevertheless, I believe that a bright line can be drawn between formulas that are used in the various methods of appraising and the specific numbers, percentages, types of property and any other matter that the individual appraisers use to make the formula applicable to the specific appraisal in question.

This court holds that stock and debt, capitalized income, and DCF are methods of arriving at true market value of BN's unit value, and that the court does not have jurisdiction to order the State of Iowa to use any specific method of appraisal. In order for BN to prevail on its claim that only the DCF method of appraisal is the proper one, it must establish by a preponderance of the evidence that there is no rational basis for the State of Iowa to use the stock and debt and capitalized income approaches, or that these approaches were used to discriminate against BN. *Burlington N. R.R. v. James*, 725 F.Supp. 1058, 1063 (D.Minn.1989), rev'd on other grounds, 911 F.2d 1297 (8th Cir.1990). Here, the Director used the appraisal methods

both parties used in the prior action that were approved by the court.

The court holds that BN has failed to carry its burden of proving that there is no rational basis for the appraisal methods used by the Director to arrive at the true market value of BN's real property in Iowa. There is no claim that the methods were used to discriminate against the BN.

B. Discounted Cash Flow

The Eighth Circuit Court of Appeals requires the trial court to weigh the evidence and make its own factual findings regarding valuations. Bair II, 766 F.2d at 1225-26. The question then arises: Whether the trial court can consider the evidence of true market value of BN's operating property as determined by the DCF method. The court has determined that it cannot. The court must arrive at its factual findings as to values using the capitalized income and stock and debt methods used by the Director. Otherwise, the court would be, in effect, ordering the Director to use DCF method to arrive at true market value.[4] The court, therefore, will not base its decision on the relative merits of the methods of

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[4] There are deficiencies in all methods of appraisal, including DCF. DCF is a theoretically sound method of appraisal, but involves more assumption and estimates than other methods. It is difficult to make long range forecasts. DCF requires much research and is complex. It is doubtful DCF would be practicable for the state to employ to value all railroads in its jurisdiction every two years.

appraisal used here. Rather, the court will limit its decision to BN's claims that the Director did not properly apply the appraisal methods he used in arriving at true market value of BN's operating property.

C. Income Capitalization Indicator

Under the income approach, the Director capitalized the 1988 calendar year net railway operating income (NROI) using a discount rate determined in the Director's normal manner. BN claims the Director used an unrealistic income stream as NROI and an improper capitalization rate.

1. Unrealistic Income Stream

BN claims the income stream was unrealistic because the Director: (a) used a single year's income; (b) failed to allow for the change in accounting practices; (c) added back deferred taxes; and (d) added back separately valued operating leases.

(a) Single years NROI

The Director used as NROI the income figures for the latest year to forecast BN's income for the next year. BN claims the use of only one year's income "leads to problems of variability in the assessment from year to year arising from transient economic results." The same argument was made in Bair III. The court there held that it was not error to use the latest year's income saying:

Although the Department's use of current earnings may cause the projected income to fluctuate more from year to year, there was no showing that over the years plaintiff would be prejudiced. Very few railroad appraisers use the five year income average. The evidence has shown that the operating income of Burlington Northern has risen substantially over the last several years and its president expects the trend to continue. This evidence, coupled with the general long term inflationary trend, persuades the Court that the use of the current year's operating income to forecast the next year's income is more appropriate. Use of the five year average would result in a consistent underestimation of plaintiff's earnings for the next year, and consequently undervalue plaintiff's transportation property. If the trend should reverse and the operating income decrease, the plaintiff would have the immediate advantage of the effect of that decrease on the next years evaluation. Bair III, 648 F.Supp. at 95. No evidence has been produced or arguments made that would cause the court to change its position. However, BN has produced evidence showing that the Director has not reduced the assessed value in the same percentage as the decreases in NROI. If the Director continues to use the latest year's income, the assessed value, less changes otherwise accounted for, should change in proportion to the change in income.

The Director did not err in using the income from the latest year as NROI. The figure he used and the one the court will use is $432,280,000. No claim is made for an adjustment based on this evidence.

(b) Accounting change

BN claims that the change from RRB accounting (retirement, replacement or betterment) to depreciation accounting makes "book income" less suitable as a starting point. The court does not agree. Although the change may shift capital expenditures to different years because certain maintenance expenses will now be depreciated instead of deducted in the year they were made, BN will still recover all of its costs.

(c) Add-back of deferred income taxes

The Director followed this court's ruling in Bair III by adding deferred income taxes back into the income stream. BN claims this is error because: "First, it is premised on the doubtful assumption that such taxes are not merely deferred, but will actually never be paid. Second, by making such an adjustment, the Director intrinsically mismatches the income stream to capitalization rates derived by market measures relative to book income. In effect, he compares apples to oranges. Third, and perhaps most importantly, such a practice is not commonly accepted as proper by appraisal experts." The court discussed this issue in Bair III stating:

> The Court is of the opinion that the assumption that deferred taxes will continue to grow and actually will never be paid back is supported by the studies and logic. If deferred taxes are not added into the income stream, the plaintiff would have an increased flow of capital that would not be capitalized. On the other hand, if

> investments would be less than the depreciation, a negative deferred tax situation would develop where more taxes were actually being paid than would have been paid under the straight-line method, plaintiffs income would be reduced by that amount and the property value lowered accordingly. As it appears that a consistent underestimation of operating income will probably develop if it is not determined by taxes actually paid, and as there would be no prejudice over the long run to plaintiff if deferred taxes are not treated as an expense in arriving at income, the Court believes that the plaintiff has failed to establish by a preponderance of the evidence that the defendant erred in computing operating income by using taxes actually paid and not treating deferred taxes as an expense.

Bair III, 648 F.Supp. at 96.

I have not changed my opinion. The Director was correct in adding $52,375,000 to the NROI.

(d) Leased equipment adjustment

BN leases and has exclusive use of certain operating personal property such as locomotives, railcars and computers. Because commercial and industrial personal property is exempt from taxation under Iowa law, the value of leased operating property is not part of BN's value to be taxed. The Director separately values BN's operating leases and adds that value to its unit value estimations.

BN claims this approach "double counts the value of this leased equipment because the value of such property is already subsumed within BN's operating income

(which was capitalized by the Director) and is captured in BN's stock price which the Director uses as a surrogate for asset value in its stock and debt indicator."

The Director argues that "under Iowa law the court does not look to ownership alone as the controlling factor in whether property is taxed to a railroad. Rather the court determines whether the railroad is using the property exclusively for railroad purposes. Where property is used exclusively for railroad purposes, regardless of the ownership of the property, the court will uphold the property being separately taxed to the railroad." The Director's argument misses the point. Leased personal property cannot be taxed under the holding in Bair II and Bair III. The question is whether the lease add-back is required to arrive at the true market value of BN as a unit. The income generated by non-capitalized operating leases is reflected in the income stream in income approach and in the stock price in the stock and debt approach. Adding the values back double counts the operating lease value. *Burlington N. R.R. v. Department of Revenue*, Nos. C89-518(T)WD, C90-5417(T)WD, 1992 WL 201947 (W.D.Wash. Aug. 13, 1992); Ring & Boykin, *Valuation of Real Estate*, p. 434. The Director erred in adding operating lease values to its unit value estimations.

2. Appropriate Capitalization or Discount Rate

After the appropriate cash flows or income streams are identified, the appropriate rate to discount cash flows or capitalize income must be determined. This element is the most sensitive factor in the valuation of the railroad as a business enterprise in the income approach. The

parties arrived at materially different rates using the same formula.[5]

The formula is based on the weighted average cost of capital for the railroad on January 1, 1989. It takes into consideration the rates of returns on their investments, debt holders and shareholders would demand before investing in BN's debt instruments or common stock. After those rates are determined separately, they are multiplied by the percentages of debt capital and equity capital that make up BN's capital structure.

The following matters must be determined: (a) the rate of return demanded by debt holders; (b) the rate of return demanded by shareholders; (c) the appropriate percentage of each that is applicable to BN; and (d) the calculation to arrive at the capitalization or discount rate.

(a) Return for debt holders

The Director used the rate of 9.875% for the railroad's "Funded Debt Unmatured" and 9.93% for equipment obligations. BN estimated the cost of debt to be 10.07% before tax and 6.24% after tax based on the average of ratings for Moody's Aa and Baa railroad bonds for January 1, 1989. There is no indication that the Director considered an after tax rate. However, the Director's expert did reduce the debt yield by the applicable tax rate. The

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[5] Rcc = d(Rd) + e(Re)
where: Rcc = Weighted average cost of capital
d = Proportion of debt capital to total capital e = Proportion of equity capital to total capital Rd = After-tax cost of debt
Re = Cost of equity

court concludes that the rate of 6.24% is the most appropriate rate for debt financing and should be used in the formula.

(b) Return for shareholders

The cost of equity financing is defined as the minimum rate of return that a publicly traded company must earn on its equity financed projects in order to leave its stock price unchanged. Both parties used the capital asset pricing model (CAPM)[6] to calculate the rate each deems appropriate for the cost of equity capital.

Under that formula the cost of equity capital is computed by adding the difference between the market risk premium rate appropriate for BN's equity financing and the risk-free rate of return (usually the rate for short term government securities) to the risk-free rate of return. The greater the risk, the larger the market risk premium rate.

The Director used a risk-free rate of return of 6.9%. BN used a risk-free rate of return of 8.49% based on the rate of interest on one year government bonds on January 1, 1989. In its CAPM model the Director's expert used a risk-free rate of 8.9 to 9.0%. The court holds that a risk-free rate of return of 8.49% is the most appropriate.

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[6] Re = Rf + B(Rm - Rf)
where: Re = Cost of equity capital
Rf = Risk-free rate of return
Rm = Market rate of return
(Rm - Rf) = Market Risk premium
B = Beta (the volatility of the subject's equity compared to a market index such as the S & P 500)

The Director determined that the risk premium was 5.7% above the risk-free premium of 6.9%. The railroad's expert determined that the risk premium was 8.3% above the risk-free premium of 8.49%. The Director's expert determined that the risk premium was four to five percent above the risk-free premium of 8.9 to 9.0%.

The Director did not offer an explanation for the figures he used. BN used the research conducted by Ibbotson Associates of Chicago during the period from 1926 through 1987. During that period, common stock investments in Standard & Poors 500 index provided an 8.3% average annual rate of return over that of one year government bonds. The Director's expert expressed difficulty with the sixty year historical average testifying:

> The risk premium, in essence, has to be looked at in terms of where it is today, what's the expectation in the market today versus the historical average. I believe the historical average is inappropriate. It's much too high relative to current risk relationships. And I believe looking at a fair amount of data – and that would be different analysts' reports, various ways of measuring historically the risk premium – that the number is in the 4 to 5 percent range.

BN's expert responded that he used the long-run average because the seventies and early eighties had such extraordinarily high interest rates that the numbers for that period do not give reasonable estimates of the return equity investors expect compared to treasuries. The court believes that the sixty year period is too long but agrees that the seventies and early eighties were unsettled.

The court is of the opinion that equity investors would require more than a return of five percent above treasuries to invest in BN common stock. After the restructuring BN was highly leveraged with about sixty percent of its capital structure depending on debt instruments which means that a large portion of the cash flow would be paid out in interest and would not be available to the shareholders. A rate of eight percent above risk-free interest or 16.49% is a reasonable market risk premium for 1989. The court computes the cost of equity capital as follows:

RISK FREE RATE + BETA
OF RETURN

(Market - Risk Free = Risk Premium)
Cost Rate of
of Equity Return
Capital

8.49 + 1.2 (16.49 - 8.49)
8.49 + 9.6 = 18.09
Rounded to 18%

* * *

(c) Proportion of debt capital to equity capital

In 1989 Burlington Northern Industries (BNI), BN's parent company, underwent a major restructuring. As a result, the natural resources and industrial development properties of BNI were spun off to form Burlington Resources. BNI is now involved solely in railroad transportation. BN is its sole principal asset. After the spin-off

of the natural resource assets of BNI and the assumption of BNI's debt, BN was highly leveraged with debt representing at least sixty percent of its capital structure. The Director used the actual percentage of debt and equity capital to compute BN's weighted average cost of capital. Expert witnesses for both sides used the average proportion of debt and equity capital typical for the railroad industry. Their figures varied from thirty to forty percent for debt and seventy to sixty percent for equity. Because of the difference in the rate of return required by holders of debt and those investing in stock, the percentage figures are an important component of the formula.

At trial the court questioned the use of industry-wide percentages of debt and equity capital to compute BN's average cost of capital when BN's capital structure has a much higher percentage of debt financing. It appears obvious that the capitalization rate to be applied to BN would be affected by BN's specific capital structure. As the answers given at trial did not satisfy the court, further briefing was requested.

The Director's additional brief was not helpful to the court. BN's brief referred to the testimony in the record on this point. The experts for both parties used their version of industry figures. The court is not in a position to quarrel with the experts. The court, therefore, holds that the proper percentages of capital to be used in arriving at BN's weighted average cost of capital is forty percent debt and sixty percent equity. Use of the actual percentage of debt and equity capital would tend to lower the capitalization rate when the risk to the equity holders would be greater.

(d) Computation of discount or capitalization rate

Cost of Equity x proportion of equity capital to total capital capital

18 x 60% = 10.8

Cost of Debt capital x proportion of debt capital to total capital

6.24 x 40% = 2.496

* * *

Total 13.296
Rounded to 13.3%

* * *

Under the income approach, the capitalization rate used determine the value of BN railroad system as a unit is 13.3%.

3. Computation of Value Using Income Capitalization Indicator

NROI (II C 1(a))	$ 432,280,000
Non-operating taxes (not an issue)	13,853,125
Deferred Income Tax (II C 1(c))	52,375,000
Total income stream	498,508,125
Capitalization rate	13.3%
BN's true market value under the income capitalization indicator	$3,748,181,390

* * *

D. Stock and Debt Indicator

The stock and debt method of valuing a business enterprise is a substitute for the market approach when no comparable sales are available. The stock and debt indicator is frequently used in the appraisal of large interstate businesses. This method is based on the accounting premise that assets equal liabilities plus equity. Thus, by valuing the liability side of the balance sheet one can infer that the assets are of equal value. In the earlier litigation both parties used the stock and debt indicator. The court approved of weighting the income indicator and the stock and debt indicator equally. The Director, with the exception of adding back net operating leases, followed the procedure approved in Bair III for the 1989 assessment year. BN's experts now do not consider the stock and debt approach reliable and, as previously stated, rely only on the DCF methodology. While there are several deficiencies in the stock and debt indicator,[7] they are not of recent recognition. The court believes the stock and debt indicator is as reliable as income indicators that involve estimates, forecasts, projections and subjective analyses, all involving human judgment. A good example is the wide disparity between the values arrived

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[7] Stock prices are affected by influences having nothing to do with the value of a company's underlying assets. Speculation on market trends, varying motivations, business booms and busts, tax treatment and other considerations tend to give an unrealistic picture of the value of a company measured by the stock and debt indicator.

at by the experts for the two parties when they used the DCF indicator.[8]

The stock and debt indicator's great strength is that it is the only way in which an appraiser can give objective consideration to the prospective earnings of a corporation. If you accept the basic assumption that assets equal liabilities plus equity, you use specific figures appearing in the company's records and stock market reports of publicly traded companies. In the prior litigation the process was much more theoretical, subjective and complex. At that time BN's holding company, BNI, also owned several other asset holding and income producing entities. As BNI held 100% of BN's stock, BN's stock was not publicly traded. To use the stock and debt indicator, it was necessary to determine how much BN's stock contributed to the value of BNI's stock.

In Bair III, 648 F.Supp. at 97-99, the court approved of a complex procedure designed to determine that part of the value of BNI's stock attributable to the railroad. This procedure involved the deficiencies in the income indicator as well as those inherent in the stock and debt method. In Bair III both parties produced evidence to support their values using this technique. As a matter of

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[8] Coopers and Lybrand arrived at a true market value for BN as a unit of $2.5 billion. Michael W. Goodwin and Associates concluded there was only a 10% chance that the value was less then $4.8 billion and a 20% chance that the value would exceed $6.4 billion. The 2.5 billion figure is not realistic because the debt portion of the capital structure was about the same figure and common stock was worth $2.6 billion on the market.

fact, BN gave more weight to the stock and debt method than the Director.

None of these problems are present in current litigation because all of the other entities have been spun off and, consequently, BN is the only source of operating income remaining in BNI. Therefore the market price of BNI's stock is primarily attributable to BN's operations. The court has difficulty understanding BN's vehement rejection of the stock and debt indicator. With two exceptions, the Director arrived at the true market value of the operating portion of BN's stock and debt by taking 81.5% of the market value of the sources of capital he listed. He computed the non-operating value to be 18.5% of the total. However, the Director did not reduce the market value of the common stock to 81.5% to arrive at a market value of the operating portion. His only explanation for not doing so was that the market value of the stock was so much lower than the value he computed using an equity rate of 13.33% that the market value "was not indicative of the value of the common stock" for BN, but that he "could not put a value higher than the market value or shares times the stock price." The court cannot accept this unclear reasoning as a reason for not reducing the value of the common stock to 81.5%. The Director conceded that "the value of common stock would be operating and non-operating."

There is no justification for treating the common stock differently from the other sources of capital. Although the stock was on the market at a "when issued" price, stock was sold at the reported prices. More likely the difference in valuations was an indication that the Director's equity rate was not accurate, as the court has

decided. The market value of the operating portion of BN's common stock should be reduced from $1,752,621,470 (100%) to $1,428,386,498 (81.5%), a reduction of $324,234,972.

The Director also left the operating leases at 100% of their value, or $623,263,805. However, as the value of operating leases are being totally removed because their value is picked up in the market price for the common stock as previously determined (see section II C1(d)), the court need not decide whether it should have been reduced to 81.5% Together these reductions total $947,498,777. Therefore, the Director's stock and debt indicator should be reduced to $3,957,568,377.[9]

E. Computation of True Market Value

In the court's opinion, the valuation of a railroad by discounting future cash flow or capitalizing book income, while well intentioned, is highly theoretical and requires estimates, projections and assumptions that call for subjective judgment. The method has many weaknesses. As stated before, many things beside asset value influence the decisions of persons to lend money to or invest in railroad businesses. At least this method deals in real figures rather than projections. For that reason, I believe

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[9] BN's value under stock and debt approach as shown on
$4,905,067,154 plaintiff's Exhibit 61

Less non-operating value of common stock and value of operating leases
947,498,777

Corrected market value of operating portion
$3,957,568,377

that the stock and debt and capitalized income approaches are equally good indicators and the court will give them equal weight in arriving at its own market value of BN as a unit.

Computation	
Market value income indicator	3,748,181,390
Market value stock & debt indicator	3,957,568,777
Total	7,705,750,167
divided by 2	
True market value of BN	3,852,875,084[10]

* * *

III. TANGIBLE PERSONAL PROPERTY BREAKOUT

In Bair I an effort was made to determine the portion of BN's property in Iowa that was personal property. The Director's position at that time was that BN's portion of its unit value allocated to Iowa must be considered as inseparable from its real property. Therefore only BN presented evidence as to what percent of BN's Iowa property was personalty. BN's witnesses used BN's annual reports to the Interstate Commerce Commission (ICC) and segregated the accounts as real property or personal property. Dr. Schoenwald testified that his analysis was used to segregate railroad realty from personalty. Because the court recognized that it would be impossible to arrive

[10] The court gains some comfort from the fact that this determination of fair market value is well within the range determined by seven other midwestern states.

at the exact percentage of the railroad's unit that constituted personalty, it used a common sense approach and approximated the split to be 50-50.

The Director, using the method presented by BN in the prior litigation, determined that for 1989 only 39.6537% of BN's Iowa unit value was personalty. A BN employee offered oral testimony that the mix between real and personal property in BN's total unit has not changed and argued that the Director's use of the previously approved formula results in a percentage less than fifty percent because of changes in accounting procedures since the previous litigation.[11] Although it is doubtful that there has been an actual twenty percent change in the percentage of BN's property that is personalty (50% down to 40%) in this short period of time, it is essential that some formula be presented that can be used in the future. Oral opinion testimony of a knowledgeable BN employee will not suffice.

BN's rebuttal witness, Dr. John Davis, whose primary occupation is valuing public utilities and railroads for ad valorem tax purposes, testified concerning the Director's method of computing personal property on page 6 of plaintiff's Exhibit 61. Dr. Davis opined that the net book cost basis used by the Director is not a good method, but it is the best available and most frequently used method.[12]

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[11] The ICC required the railroads to change RRB accounting to depreciation accounting.

[12] Davis testified:

The methodology used on this last page of plaintiff's Exhibit 61 is probably the most widely-used method, Your

Although it is probably true that the change in percentage is due primarily to a change in bookkeeping, one cannot expect the Director to use any method better than

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Honor, of allocating any type or any piece of any part of a system value out. For instance, sometimes you're not trying to allocate out personalty. You may be trying to allocate out realty. You may be trying to allocate out property of a certain state.

When one goes about allocating something out of a unit value, I think it is clearly understood that we don't have a good way of doing that. There is no market-driven way that I know of to do that, and so we try to come up with the best substitute.

Around the country, based on my experience, the methodology that is most frequently used is a net book cost method.

As long as you are consistent in calculating your numerator and your denominator, that is, when you look at the system property, as I understood it, the items mentioned there, road and equipment, operating leases, materials and supplies, those are all of the items that are documented that can be found that are part of the system and it is their net book cost. Below that, under personal property, are those different items, fences, communication systems, signals and so forth, that are considered to be personal property according to this form, and they are listed with their net book cost, so we're apples to apples. We're saying the best data we have is to take – put everything on the same basis, net book cost, and simply say, artificially now we will allocate a portion of this system value based on a net book cost allocation method, to allocate out.

* * *

Some of the confusion, Your Honor, and this is, it's a hard thing to say as an appraiser, is we try to work as much as we possibly can off of market factor to come up with a system value, and then we have to say, okay, now that we have a system value, how do we allocate a piece of that out. For instance in a lot of the public utilities that I value, the property is multistate, and so we want to know what state X's value is out of the total. We generally allocate on a net book cost basis, because we don't have a better method. We'd love to have a better method, just don't have one.

the best available. That does not mean that this percentage of personal property is wrong – perhaps it was the fifty percent figure that was inaccurate. In any event, the court approves of the Director's use of the net book cost basis, the best available methodology. He was correct in using 39.6537% as personal property.

BN also contends that ballast ($417.573 million), ties ($627.324 million) and track ($1,454.830 million) in place and part of the railroad system are in fact personal property and should be deducted from the unit value of the operating assets of the railroad. The court believes these items are properly classified as improvements to the land and are taxable as real estate. However, the court need not rely on this position because ballast, ties and rails owned by commercial and industrial taxpayers in Iowa are taxed as real estate. BN is not being subjected to discriminatory taxation by including these items as real property.

IV. INTANGIBLE PERSONAL PROPERTY DEDUCTION

When a railroad is valued as a unit on a business enterprise or going concern basis, that valuation necessarily includes intangible assets. If a state exempts most personal property from ad valorem taxation, that exemption would include identifiable and quantifiable intangibles. In this case BN has identified and valued three kinds of intangible personal property: computer software, assembled work force, and long term coal hauling contracts. BN claims that section 306 prohibits Iowa from including these intangibles in its valuation for tax purposes because Iowa does not tax intangible personal

property of commercial and industrial taxpayers. The Director argues that going concern intangibles are assessed in Iowa as real property because local assessors capture intangibles in the assessment of real estate. Therefore, BN has no claim under section 306(1)(d) "even if methodologies for centrally assessed properties differ from commercial and industrial methodologies." The Director further argues that "the exclusion of financial intangibles from the [railroads'] unit value and the removal of personal property for railroads and the adjustments of the cost value for commercial and industrial real estate to account for sales price (by the county assessors) and sale ratios (by the Director) leave both parties similarly situated."

Assuming for the purposes of argument that such approach would leave the parties similarly situated, which is questionable, the evidence does not show that adjustments and sales ratios pick up the value of commercial and industrial intangibles. Computer software, assembled work force and coal contracts have some value that remains in BN's unit value and make some contribution toward the cash flow. The Director's evidence that there are adjustments to the value of commercial and industrial real estate to account for the sales price to include such intangibles is not persuasive. The court holds that Iowa does not tax identifiable intangibles as real estate.

A. Taxation of Commercial and Industrial Intangibles

Section 441.21(2), Code of Iowa, provides that "the special value or use value of the property to its present owner, and the good will or value of a business which uses the property as distinguished from the value of the property as property" shall not be considered in determining market value. The railroad has been valued as a business and the intangible personal properties involved here are components of that value. It appears that the foregoing statute and Iowa case law, *Heritage Cablevision v. Board of Review*, 457 N.W.2d 594, 598 (Iowa 1990), prohibit the assessor from considering such intangibles when appraising commercial and industrial property. Thus BN is being discriminated against unless commercial and industrial intangibles are being taxed in violation of the statute.

In *Heritage*, the Iowa Supreme Court approved of the following statement from the district court.

> [W]hile the market approach method utilized by Kocer may have validity if he were attempting to determine the market value of the system, it does not follow that the method accurately determines the value of taxable assets. That is, the court concludes that the total fair market value of the system necessarily includes nontaxable assets such as a franchise to operate, an established customer base, experienced personnel in place, goodwill, and other intangibles.

Id. at 598.

The supreme court then said:

> We believe the district court's conclusion concerning these comparable sales was valid. The evidence suggests that a cable television system, as a going business enterprise, can generate tremendous income for the owners. We believe that the valuations which Kocer derived from these sales failed to exclude the substantial value which the buyers were receiving from the business enterprise with which the taxable assets were associated. Kocer attempted to determine that portion of the total price paid for other cable television systems as going concerns which was attributable to the taxable assets. He did so by taking the franchise fee payable to the governmental body, capitalizing that sum and subtracting the latter figure from the total sale price. We do not believe this adjustment produced a figure which is in any way representative of the fair and reasonable exchange between a willing buyer and willing seller of only the taxable assets.

Id. at 599.

The Director relies heavily on *Maytag Co. v. Partridge*, 210 N.W.2d 584, 590 (Iowa 1973). At that time section 428.22 of the Iowa Code provided that machinery used in manufacturing establishments shall for the purpose of taxation be regarded as real estate. The issues in Maytag were quite different. Maytag argued that machinery used in its operation should be valued and taxed at the market price of used machinery for sale. The Iowa Supreme Court rejected this claim and approved of the assessor recognizing the effect of the machinery's use on the value

of the property itself. Maytag acknowledged that intangibles were not to be taxed. Id. at 590. In *Heritage* the court said:

> The application of the "going concern" principle in Maytag Co. was in the context of rejecting the property owner's claim that its machinery should be valued exclusively by a market data analysis of the used machinery market. We approved the assessor's depreciated cost appraisal in that case under the "other factors" approach. We did not suggest in Maytag Co. that in trying to value taxable assets under a comparable sales analysis the statutory directives against considering "special value or use value of the property to its present owner, and the goodwill or value of a business which uses the property as distinguished from the value of the property as property" may be disregarded.

Heritage, 457 N.W.2d at 599.

The Director introduced testimony from local assessors and state officials attempting to show that the Declarations of Value included intangibles in the purchase price of real estate. The forms, if properly completed, would not include intangibles because they ask the price for real property only. If an intangible is listed, its cost is deducted from the total price. Intangibles may inadvertently be included in the gross price if not identified with a price. However, that in the court's opinion does not change Iowa law that intangibles are not to be taxed as real estate.

The court rejects the Director's argument that intangibles are in fact taxed as part of the real estate in Iowa.

The Iowa tax system does not tax intangible property as such.

B. Value of Intangible Assets

BN's experts identified intangible assets that contributed to BN's value as a business enterprise. The cost approach was used to value BN's computer software ($176,000,000) and assembled work force ($233,000,000). The income approach was used to value the coal contracts ($263,000,000). The experts deducted these determined values dollar for dollar from their computed $2.5 billion for the system as a whole. It is acceptable to use the cost approach to arrive at values for the computer software and the work force in place. The income approach is an appropriate way to value the coal contracts. But the dollar for dollar deductions from the unit value of the railroad is not the proper method to arrive at the value of BN's real property. Use of this procedure would mean that the value of BN's real estate would be whatever value is left after the computed values of tangible and intangible personal property are deducted from the unit value. For example, combining all of the claims advanced by BN in this litigation you come up with this very questionable result.

Unit value of the railroad	$2,500,000,000
Less 50% as personal property	1,250,000,000
	1,250,000,000
Less value of intangibles	672,000,000
Value of real estate	578,000,000

This value for BN's operating real property is ridiculous. It operates one of the largest railroad systems in the

United States. BN's system consists of 23,500 miles of operating track connecting the Midwest, the Pacific Northwest and the Gulf Coast. Under BN's approach the value of all its operating real property would be considerably less than the value of the identified intangibles, although the book value of the railroad real property is $3,500,000,000.[13]

The value of BN's real estate cannot be determined by accepting the remainder of the unit value of BN after the values of these intangibles is computed and deducted. If separate values had been determined for the real property as well as tangible and intangible personal properties and all three added together and the result proportioned, it would have made some sense. But to say the value of the real estate is just what is left, is unacceptable. There is no proof of the relationship between these values and the market value of the railroad whether the income or stock and debt indicators are used. There is no proof of the contribution these intangibles made to the cash flow or the price of the stock. The court cannot accept the proposition that every dollar of their value went into the cash flow or stock price. The court could therefore hold that BN has failed to establish by a preponderance of the evidence the contribution that these intangibles made toward the cash flow or the price of the stock of BN and deny it any relief from the state's taxation of these identified intangibles. However, these intangibles do have

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[13] From page 7, Exhibit 61 –

Net book value of the system	$5,798,249,686
Less personal property and operating leases	2,299,220,686
	$3,499,029,000

some value that should be recognized and the court believes there is evidence in the record by which their contribution to the cash flow and stock price can be considered, although there is no expert testimony supporting this analysis.

Why shouldn't intangible personal property be broken out of the unit value the same way tangible personal property is? Book values were used to determine the proportion of unit value represented by tangible personal property. BN's expert conceded that this is not a good method, but it is the best available method of taking particular assets out of the unit value. See footnote 12. The court will use the book values of the BN railroad and add the computed values of the intangibles, which have no book value, determine the percentage applicable to the intangibles and allow that percent as a deduction from true market value.[14] The net book values are taken from page 7 of Exhibit 61. The proportion attributable to intangibles is ten percent and the allowable deduction is $672,000,000.[15]

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[14] I realize that I am off on a "frolic of my own" in taking this approach but I am convinced it is the best result. I also realize I am combining book value with appraisals of true market value, but I could not accept the dollar for dollar deduction but I know the intangibles contributed to BN's value.

I also recognize that the valuation of intangibles will pose a serious problem for the Director. The expense of arriving at a value for these assets that have no intrinsic value will be great. But, I do not see any way to avoid acknowledging that they have a value that should not be taxed as part of the real estate.

[15] Net book value $5,798,249,686
Add value of intangibles 672,000,000

IV. EQUALIZATION

The 4-R Act prohibits assessing "rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. § 11503(b)(1). The court has attempted in the foregoing divisions to arrive at the true market value of the railroad as an operating unit and the 100% value of its real property in Iowa subject to Iowa property tax. Iowa, by statute, also assesses commercial and industrial property at 100% of true market value. Iowa and five other states permit an assessment variance from true market value of five percent (95% to 105%) which is the strictest tolerance among the states and matches the five percent tolerance permitted by section 306. BN claims that commercial and industrial property in Iowa is valued at less than ninety-five percent of its true market value. The Director claims that Iowa commercial and industrial property is valued well within the five percent variation permitted.

Total value		$6,470,249,686
Value of intangibles	672,000,000	
Total value	= 6,470,000,000 =	10.3%
Round to		10%

A. Assessment Jurisdiction

The 4-R Act defines an assessment jurisdiction as "a geographical area in a state used in determining the assessed value of property for ad valorem taxation." 49 U.S.C. § 11503(a)(2). The question at issue here is whether the appropriate assessment jurisdiction for purposes of equalization is the State of Iowa as a whole or each individual county in which the railroad owns real property.

The Director's equalization process operates on a county by county basis. The Director claims that discrimination against BN is correctly measured by the assessment ratios in the counties where BN has property weighted by the amount of BN property in the county. If this measure is proper, the appraisals are within the five percent tolerance. BN contends that the average level of assessment for commercial and industrial property in the state as a whole should be used for equalization purposes under section 306(1)(a) even though BN has real property in only twenty-eight of Iowa's ninety-nine counties. BN's main line runs east and west across rural southern Iowa. Branch lines run into Polk and Dubuque counties. The distribution of BN's value among the counties is in sharp contrast with the distribution of commercial and industrial values. The ten counties with the highest commercial property valuations account for more than sixty percent of the statewide commercial value but contain less than eight percent of BN's Iowa value. Counties which have no BN value contain about fifty-five percent of Iowa's commercial value. The Director argues that "a statewide weighted assessment ratio is an inaccurate measure of alleged tax discrimination against [BN]. The statewide

ratio will be determined primarily by the results of the ratios from the larger counties and the counties which have no [BN] value. These ratios will not affect [BN's] ad valorem taxes because [BN] has little or no property in these counties and hence has little or no tax at stake."

Section 306 is ambiguous. It could be interpreted to permit the use of the commercial and industrial properties in only those counties where BN has real estate. However, all courts addressing this issue have concluded that where railroads are centrally assessed by the state, the assessment jurisdiction within the meaning of section 306 is the entire state. *Arizona v. Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 405 (9th Cir.1981); *Southern Ry. v. State Bd. of Equalization*, 712 F.Supp. 1557, 1564-65 (N.D.Ga.1988); *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 552 F.Supp. 1031, 1035 n. 7 (D.Kan.1982), aff'd in part, rev'd in part, 732 F.2d 1495 (10th Cir.1984). Although it is true that the statewide ratios of assessments to true market value will not directly affect BN's millage rate, which is set locally, the amount of taxes paid is also dependent upon the value placed on BN's property, which is centrally appraised. Iowa makes a strong effort to equalize the locally made assessments so that the appraisals in all counties approach uniformity. This is important because some state aid is distributed on the basis of property valuations. The assessment ratios should be about the same throughout the state. A railroad should not be benefitted or penalized if a local assessment, inadvertently, is not equalized. A comparison of the assessment ratio for commercial and industrial property throughout the state with BN's true market value would tend to be more reliable because of the greater number of parcels

involved. In addition, all the railroads that run through Iowa would be subject to the same assessment ratio for commercial and industrial property, thus eliminating any competitive advantage or disadvantage which might result from possible uneven assessments in different counties. The court, therefore, holds that the correct assessment jurisdiction for the comparison of the ratio of assessments to true market value of commercial and industrial property is the State of Iowa. The court will next consider whether the statewide assessment ratio for commercial and industrial property in Iowa is within the 95% to 105% range of true market value.

B. Commercial/Industrial Assessment Ratio

After hearing the expert witnesses testify, reading and re-reading their testimony, and closely examining their sales ratio studies, the court finds that BN has failed to establish by a preponderance of the evidence that the non-railroad commercial and industrial property in the State of Iowa is appraised at less than ninety-five percent of its true market value. In fact, the court is persuaded that the commercial and industrial property in Iowa is appraised within five percent of its true market value. Experts from both sides utilized the exact same sales ratio data accumulated by the Director from Declarations of Value that Iowa law requires to be filed before a real estate deed may be filed of record. The Director, following his regularly established procedure designed to screen out abnormal or non-arms-length transactions, furnished data on 796 "normal" deed sales of commercial property and thirty-three sales of industrial property.

Dr. Richards, BN's expert, combined commercial and industrial sales during 1989 and worked from a total of 829 sales. The Director's experts, Gloudemans and Dornfest, used commercial sales only. The omission of the industrial sales, which the Director's experts believed should be treated separately, did not hurt BN because the assessment ratio for industrial properties was higher than for commercial.

Dr. Richards eliminated from his ratio study sixty-two sales in which the assessment ratio exceeded 200%, deciding "that these were most likely not truly arms length transactions and, therefore, should have been deleted by the State of Iowa." Dr. Richards did not delete any sales at the low end of the assessment ratios. He eliminated sales where the appraisals were greater than double the sales price, but left in thirty-three sales where the appraisal was less than half of the sales price. This was contrary to International Association of Assessing Officers (IAAO) standard 6.6 which limits trimming to five percent and requires equal trimming from the extreme ratios on both sides of the median. Gloudemans and Dornfest, the Director's experts, eliminated only four "outlier" sales; two because the assessment ratio was fourteen times the sale price when the next highest ratios were 7.5, and two because the values were so much greater than the rest of the sales that they would receive an inordinate amount of weight in the computations. The court believes that the elimination of these four outlier sales was more appropriate than the blanket elimination of all sales of Iowa commercial and industrial real estate where the ratios exceeded two times or 200%. The Director had screened these sales and eliminated sales he

considered abnormal. He determined the sixty-two sales of commercial and industrial real estate were not abnormal. Dr. Richards stratified the counties according to the number of commercial industrial properties they contained. There were eighty-three counties in Strata 1 containing less than 1000 parcels; seven counties in Strata 2 containing 1000 to 2000 parcels; seven counties in Strata 3 containing 2000 to 3500 parcels; and two counties in Strata 4 containing over 3500 parcels. Although stratification can add efficiency to a sales ratio study, the stratification by number of commercial and industrial properties in the county has little, if any, relationship to assessment ratios. Stratification by number of sales or value of sales would have been more meaningful because there was evidence that samples' accuracy increases as the number of sales increases, and that there is a tendency to over appraise properties of lesser value. Dr. Richards used the weighted average mean to arrive at his level of assessment of commercial and industrial property. Excluding public utilities, he arrived at an assessment ratio of 89.34% of the true market value of commercial and industrial property. When he included non-rail public utilities the ratio rose to 90.07%. This testimony supported BN's claim that Iowa commercial and industrial property was assessed at less than ninety-five percent of their true market value.

Gloudemans, the Director's expert, made several different calculations using both the median and weighted mean. Gloudemans' calculations all exceeded ninety-five percent of true market value except for the calculation on the weighted mean of 92.82% of the market value when the four "outliers" were left in.

The use of median or weighted mean each have advantages and disadvantages. In this particular situation the court felt the use of either or both was acceptable.

The prior discussion deals with the important differences between the experts' studies. Further analysis of their opinions would not be helpful. The experts were well qualified and presented sound evidence to support their positions. The court has expressed the problems it had with Dr. Richards' analysis. BN's evidence relating to assessment ratio is, at best, no more persuasive than the Director's.

As stated earlier, the court finds that under this record, giving due regard for the Director's expertise, the Director has assessed commercial and industrial property at least ninety-five percent of its market value. In any event BN has failed to sustain its burden to prove otherwise.

VI SUMMARY

In summary, I find and hold that:

1. Capitalization of income and stock and debt approaches to valuation are "methods" and not the "applications" of methods. The court cannot require the Director to use any particular method to value railroads as business enterprises.

2. The court will not use the DCF method to value BN as that would, in effect, require the Director to use that method. The DCF method is no more reliable than other accepted methods of appraisal.

3. The Director did not err in using the income from the latest year as NROI.

4. The change in the method of accounting did not make reliance on book income less suitable.

5. The Director acted properly in adding deferred income taxes to the NROI.

6. The Director erred in adding operating leased equipment to the NROI because their value is captured in the cash flow and stock price.

7. The rate of return to debtholders to be used in computing the appropriate capitalization rate is 6.24%.

8. The rate of return to shareholders to be used in computing the appropriate capitalization rate is eighteen percent.

9. The proportion of debt capital to equity capital to be used in computing the appropriate capitalization rate is forty percent debt and sixty percent equity.

10. The correct capitalization rate is 13.3%.

11. The true market value of the BN as a business enterprise using the income capitalization indicator is $3,748,181,390.

12. The true market value of the BN as a business enterprise using the stock and debt method indicator is $3,957,568,377.

13. The income capitalization and stock and debt indicators are entitled to equal weight, and the true market value of BN as a business enterprise is $3,852,875,084.

14. The court approves of the Director's use of net book cost basis to determine the tangible personal property breakout.

15. Ballast, ties and rails in place as part of the system are taxable as real property.

16. Computer software, assembled work force and long term coal contracts are intangible assets that contribute to the value of BN.

17. Iowa does not tax intangible property as part of commercial and industrial real estate. Therefore, whatever value the railroad's intangibles contribute to BN's value as a business enterprise should not be taxed.

18. The appraised value of the intangibles cannot be deducted dollar for dollar from the true market value of BN as a business enterprise.

19. Use of the net book cost basis to determine the proportion of BN's true market value attributable to these intangible assets results in ten percent of their appraised value or $67,200,000.

20. The correct assessment jurisdiction for equalization purposes is the whole State of Iowa.

21. The Director has assessed commercial and industrial property at more than ninety-five percent of its value. In any event BN has failed to prove otherwise.

The court has, with trepidation, made the foregoing calculations. However, the remaining calculations will be left to the expertise of the parties using the court's findings and holdings.

I cannot conclude this opinion without offering some gratuitous advice to the railroads, the states and the federal government. The 4-R Act was enacted to protect the railroads from discriminatory taxation by the states, a valid concern. However, the statute, as it now stands, has spawned considerable and very expensive litigation. The issues of national significance should be resolved on a national level. Different states should not have different unit values for the same interstate railroad. The percentage of that value consisting of tangible and intangible personal property for the specific railroad should be the same throughout the country. The statute should be amended to give the Interstate Commerce Commission, or other appropriate board or commission the authority and duty to value all interstate railroads and determine the percentages of that value attributable to tangible and intangible personal property. The states and the railroad should have input during the evaluation procedure and the right to appeal. But these issues should be resolved in one lawsuit between the interested states and the railroad. Those issues relating to taxation in a specific state, like equalization, could still be tried in federal court in the state involved.

The changes suggested should save the railroads and the states considerable sums of money, treat all states and railroads equally and reduce the burden on federal courts.

The court directs BN to take the responsibility for the preparation of Order for Judgment in accordance with this Ruling and Order. It shall be submitted to the Director for his approval and then submitted to the court. If

there is disagreement over the contents of such an order, the matter will be resolved by the court.

IT IS SO ORDERED.

APPENDIX C

The BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

v.

Gerald D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

No. 4:90CV-60406.

United States District Court,
S.D. Iowa, C.D.

June 11, 1993.

Order for Judgment Nov. 9, 1993.

Stephen D. Goodwin, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, Memphis, TN, James McBride, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, Washington, DC, Richard A. Malm, Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, IA, for plaintiff.

C. A. Daw, Dillion, Bosch & Daw, Chartered, Boise, ID, James D. Miller, Asst. Atty. Gen., Des Moines, IA, for defendant.

RULING AND ORDER

STUART, Senior District Judge.

Plaintiff's Motion for Instructions and defendant's Motion for Reconsideration came on for hearing May 25, 1993. After having heard the additional evidence and arguments of counsel and after having considered the

pertinent filings, the court enters the following ruling and order.

Plaintiff's Motion for Instructions

In its motion, plaintiff pointed out that the court had erroneously computed the deduction for intangibles under the principle the court applied. The defendant did not respond to this claim and the court agrees with BN. The court accepted the values for the intangibles established by BN's experts and determined they equalled approximately 10% of the unit value of the railroad. The court erroneously took 10% of the value of the intangibles rather than 10% of the unit value to arrive at the deduction for the value of the intangibles. The deduction should be $385 million rather than $67.2 million. The plaintiff in drawing the order for judgment, shall make that correction.

Defendant's Amended Motion for Reconsideration

I. Intangibles

A. The defendant's principal position in regard to the deduction of intangibles from the unit value of the railroad was the claim that Iowa taxed the intangibles of commercial and industrial enterprises in Iowa. The court did not agree for the reasons stated in the Ruling and Order filed March 9, 1993. 815 F.Supp. 1223

The defendant did claim that a deduction for intangibles would be very difficult to administer, but little evidence was offered on that issue. In order for the appellate court to have a complete picture of the administrative

problems, the court received additional evidence "on the limited issue of the problems that the court's ruling on intangibles would present to the state." That evidence was presented at the May 25, 1993 hearing.

Although obtaining and analyzing the information required to value intangibles will be more complex and expensive, the state can arrive at values for the railroad's intangibles. However, that increased burden does not permit the state to tax BN's intangibles when commercial and industrial intangibles are not taxed as real estate. The 4R Act requires the state to treat railroads the same way other taxpayers in Iowa are treated.

The court finds that its decision that identifiable intangibles that can be valued must be deducted from the unit price of the railroad is susceptible to administration by the Director.

B. The Director claims that BN has failed to prove the value of its intangibles by a preponderance of the evidence because it selected only certain intangibles for valuation and subtraction when some intangibles may have a negative value. The court is satisfied that the methods used by BN to arrive at values for the intangibles are acceptable. The Director offered no evidence of different values. Under the present record the court believes that reasonable estimates of the value of the selected intangibles have been established by BN. It is too late to reargue these matters in a motion to reconsider. The director may take issue with the methods used and the values derived in the future.

As stated on page 36 of its ruling and order, the court was troubled by the fact that there was no proof of the

contribution these intangibles made to the cash flow used in the capitalization formula or the price of stock in the stock and debt method. I contemplated holding, for that reason, that BN failed to prove what amount should have been deducted from the unit price. Perhaps that would have been the proper ruling, but I believed that the method used to deduct personal property could be applied to intangibles, even though replacement cost and income evaluations are being used with book value. The court denies the defendants motion for reconsideration of its ruling on the deductibility of the identified intangibles.

II. Split between operating and non-operating property.

The court is satisfied that the evidence supports the acceptance of the Director's calculation of the rates between BN's operating and non-operating property. Mr. Goodwins' use of income rather than value to determine the proper percentage of non-operating property, in the court's opinion, is not correct. The ratio of income from operating property to the income from non-operating property would not necessarily represent the ratio of the value of operating and non-operating property. The comparison should be between the values of the operating and non-operating properties, not the income they produce. The court does not recall that an issue was ever made of the Director's calculation during the trial.

Plaintiff's motion to reconsider the split between operating and non-operating property is denied.

III. Split between realty and personalty.

The director claims:

The split between BNRR's taxable and non-taxable property should be calculated by reference only to book values of property owned by BNRR where only "property owned by BNRR is valued in the BNRR unit." In the court's opinion the value of leases is picked up in the railroad's unit value in both the income and stock and debt appraisal methods and the break out of personal property must include leased property. The court believes this argument was adequately treated in the ruling and order.

Defendant's motion to reconsider on this ground is denied.

IV. Yield capitalization rate.

A-1 The director argues that the court should have used the beta coefficient of 1.127 obtained from the tapes of the Center for Research on Security Prices (CRSP tapes). The court used a beta of 1.2, but did not explain why. The director asks why the "beta from the CRSP tapes is not useable in this instance."

The court has not reviewed the evidence to answer this question but its recollection is that the CRSP tape beta was the beta established before the BN reorganization that greatly increased the railroad's debt. The court felt that the increased leverage would cause the beta to rise. A beta of 1.2 is within the range estimated by BN's witness and is the industry average beta used by BN in Exhibit 1 at page 19.

A-2 The director continues to argue that his cost of capital determination was supported by more than a preponderance of the evidence including internal calculations by BNRR, the Interstate Commerce Commission and the Director's experts. He does not point to any specific evidence.

The court believes this issue was adequately treated in the ruling and order and defendant's motion for reconsideration on this ground is denied.

B and C In these subdivisions defendant argues that the market risk premium and BNRR's equity rate are not affected by BN's high level of leverage after restructuring. The court disagrees and discussed this issue adequately in the ruling and order.

D In calculating BN's capitalization rate the court used the after tax debt rate. The parties agree that this was error. The court failed to recognize the distinction between capitalization rates calculated by the discounted cash flow method and the rate calculated by the income capitalization method.

If only the interest rate is changed in the calculations, the resulting capitalization rate [is] 14.83 per cent. In the court's opinion this rate is excessive. The cost of capital arrived at by plaintiff's experts in plaintiff's exhibit 1 at page 19 was 14%. The court believes 14% to be a reasonable capitalization rate.

In preparing the order for judgment the plaintiff shall use the capitalization rate of 14%.

The court is still not comfortable with the proportion of debt capital to equity capital used in computing the

capitalization rate. The court considered BN's high leveraged position important in several areas. The court is unable to understand why the industry-wide percentage of debt capital and equity capital rather than BN's specific situation should be used for this computation. But as all experts used the same approach, the court relied on their expertise.

One other matter remains for resolution. The coal model used by BN's experts in arriving at its value for the coal contracts, included a unit value for the system of $2.5 billion. As the court determined a $3.8 billion value (which will be changed as a result of this ruling) the value of the coal contracts needs to be recomputed using the same formula used by BN to arrive at a value. Parties have indicated a willingness to try to agree on such calculation. If they are able to arrive at a revised figure, the corrected figure should be included in the order for judgment. If they cannot agree, they may submit the question to the court for resolution.

Except as stated herein defendant's motion for reconsideration is denied. Plaintiff shall retain the responsibility for preparing an order for judgment in accordance with the original Ruling and Order as amended by this ruling.

IT IS SO ORDERED.

ORDER FOR JUDGMENT

On March 9, 1993, the court filed a Ruling and Order in the above-entitled matter and directed Burlington Northern to prepare an Order for Judgment in accordance

therewith. Defendant filed a Motion for Reconsideration. At the hearing on Director's motion, the parties agreed that the difference between Burlington Northern's unit value as determined by the court and the value used by Burlington Northern in its model would affect the value of the intangible asset, long term coal contracts. The court was under the impression that it was just a matter of inserting the court's unit value for Burlington Northern into mathematical computations. However, the parties have been unable to agree on the value of long term coal contracts and have furnished affidavits supporting their determinations of their value. Burlington Northern arrived at a value of $251,000,000. The Director valued them at a negative $136,000,000. The court considers both affidavits as attempts to bring in additional evidence after the record has been closed. Neither will be considered by the court in attempting to arrive at the value of long term coal contracts, the only issue remaining for resolution.

As the court has previously stated, intangible personal property has some value that should not be included in the value of Burlington Northern's real property in Iowa. Burlington Northern presented evidence relating to the value of intangible assets, computer software, work force in place and long term coal contracts. The court has accepted the value of computer software and work force in place as computed by Burlington Northern. The court has now re-examined the evidence in the record relating to the value of the long term coal contracts and has reached the conclusion that Burlington Northern has failed to carry its burden of establishing the value of the coal contracts by a preponderance of the

evidence. Therefore, this element must be excluded from the calculations leading to the determination of the value of Burlington Northern's real estate taxable in Iowa.

The court was unable to accept Burlington Northern's dollar for dollar reduction of intangible assets from Burlington Northern's unit value. There is no relevant relationship between the computed values of the intangible assets and the contributions those assets made to the cash flow and unit value. As the court believed that these intangible assets had value that should not be included in an evaluation of Burlington Northern's real property, the court developed a formula which in its opinion was consistent with the formula used to arrive at the contribution tangible personal property made toward unit value.

Rightly or wrongly, the court will apply that formula in determining the value that computer software and work force in place contribute to Burlington Northern's unit value. That value is computed as follows:

Book value of BN's railroad system	5,798,250,000
Values of the work force in place and computer software	409,000,000
Total	6,207,250,000

Intangible values as a percent of the system value 6.6% (409,000 divided by 6,207,250)

The computation of the true market value of Burlington Northern's real property in Iowa is as follows:

	(000'S)	
Unit Value[1]	3,759,170	
Intangibles Deduction[2]	(248,105)	
Tangible Unit Value	3,511,065	
Allocation to Iowa (3.6497%)[3]		128,143
Tangible personalty deduction (39.6537%)[4]		(50,813)
Iowa real property value		77,330
Locally-assessed deduction[5]		(8,291)
True Market Value	69,039	

Based on the court's rulings and orders, the true market value of Burlington Northern's real property in Iowa for the 1989 tax year does not exceed $69,039,000, as calculated above. This calculation is based on the court's rulings that:

a. the income approach and the stock and debt approach should be given equal weight;

b. the income approach should utilize the latest year's NROI as reported in Burlington Northern's R-1 report (Schedule 210, line 67), adjusted only by adding non-operating taxes (ICC Supplemental Schedule 250) and by adding or subtracting deferred income taxes (Schedule 21, line 64);

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[1] Ruling of March 9, p. 45, and Ruling of June 11, p. 6.

[2] (3,759,170 x .066).

[3] Plaintiff's Exhibit 61 (Director's workpapers).

[4] Ruling of March 9, p. 30.

[5] Plaintiff's Exhibit 61.

c. a capitalization rate of 14% is appropriate;

d. the "add-back" of the value of leased equipment is improper;

e. the value of Burlington Northern Railroad Company's computer software and assembled work force must be deducted from the unit value.

The Director's assessment of Burlington Northern's real property for the 1989 tax year was $98,726,000. As shown above, the fair market value of Burlington Northern's real property in Iowa does not exceed $69,039,000. Therefore, the ratio of the assessed value to the true market value of Burlington Northern's property in Iowa is 143%. This ratio must be reduced to no more than 100% by reducing the assessed value to $69,039,000, or a reduction of $29,687,000. Gerald D. Bair, the Director of the Department of Revenue and Finance of Iowa, his agents, and those acting in concert or participation with him, are enjoined and restrained from the levy, collection, or assessment of ad valorem taxes against Plaintiff Burlington Northern Railroad Company in the State of Iowa for the 1989 tax year as follows:

1. The Defendant is prohibited from assessing Burlington Northern's real property in Iowa at a ratio to its true market value exceeding the ratio of the assessed value of all other commercial and industrial real property in Iowa to the true market value of all such other commercial and industrial real property in Iowa. The highest permitted assessment is $69,039,000.

2. The Defendant is enjoined from adding the value of operating leased equipment to the unit value.

3. The Defendant is enjoined from using a capitalization rate in the income approach lower than 14%.

4. The Defendant is enjoined from taxing the value of the computer software and the value of the assembled work force.

The Clerk of Court is authorized and directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

Civil No. 4-90-CV-60406

The Burlington Northern Railroad Company,

Plaintiff,

v.

Gerald D. Bair, Director of the Department of Revenue and Finance of Iowa,

Defendant.

ORDER FOR JUDGMENT

On March 9, 1993, the court filed a Ruling and Order in the above-entitled matter and directed Burlington Northern to prepare an Order for Judgment in accordance therewith. Defendant filed a Motion for Reconsideration. At the hearing on Director's motion, the parties agreed that the difference between Burlington Northern's unit value as determined by the court and the value used by Burlington Northern in its model would affect the value of the intangible asset, long term coal contracts. The court was under the impression that it was just a matter of inserting the court's unit value for Burlington Northern into mathematical computations. However, the parties have been unable to agree on the value of long term coal contracts and have furnished affidavits supporting their determinations of their value. Burlington Northern arrived at a value of $251,000,000. The Director valued them at a negative $136,000,000. The court considers both

affidavits as attempts to being in additional evidence after the record has been closed. Neither will be considered by the court in attempting to arrive at the value of long term coal contracts, the only issue remaining for resolution.

As the court has previously stated, intangible personal property has some value that should not be included in the value of Burlington Northern's real property in Iowa. Burlington Northern presented evidence relating to the value of intangible assets, computer software, work force in place and long term coal contracts. The court has accepted the value of computer software and work force in place as computed by Burlington Northern. The court has now re-examined the evidence in the record relating to the value of the long term coal contracts and has reached the conclusion that Burlington Northern has failed to carry its burden of establishing the value of the coal contracts by a preponderance of the evidence. Therefore, this element must be excluded from the calculations leading to the determination of the value of Burlington Northern's real estate taxable in Iowa.

The court was unable to accept Burlington Northern's dollar for dollar reduction of intangible assets from Burlington Northern's unit value. There is no relevant relationship between the computed values of the intangible assets and the contributions those assets made to the cash flow and unit value. As the court believed that these intangible assets had value that should not be included in an evaluation of Burlington Northern's real property, the court developed a formula which in its opinion was consistent with the formula used to arrive at the contribution tangible personal property made toward unit value.

Rightly or wrongly, the court will apply that formula in determining the value that computer software and work force in place contribute to Burlington Northern's unit value. That value is computed as follows:

Book value of BN's railroad system	5,798,250,000
Values of the work force in place and computer software	409,000,000
Total	6,207,250,000
Intangible values as a percent of the system value	6.6%

(409,000 divided by 6,207,250)

The computation of the true market value of Burlington Northern's real property in Iowa is as follows:

	(000's)
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Tangible Unit Value	3,511,065
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Tangible personalty deduction (39.6537%)[4]	(50,813)
Iowa real property value	77,330
Locally-assessed deduction[5]	(8,291)
True Market Value	69,039

Based on the court's rulings and orders, the true market value of Burlington Northern's real property in Iowa for the 1989 tax year does not exceed $69,039,000, as

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[1] Ruling of March 9, p. 45, and Ruling of June 11, p. 6.

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[3] Plaintiff's Exhibit 61 (Director's workpapers).

[4] Ruling of March 9, p. 30.

[5] Plaintiff's Exhibit 61.

calculated above. This calculation is based on the court's rulings that:

a. the income approach and the stock and debt approach should be given equal weight;

b. the income approach should utilize the latest year's NROI as reported in Burlington Northern's R-1 report (Schedule 210, line 67), adjusted only by adding non-operating taxes (ICC Supplemental Schedule 250) and by adding or subtracting deferred income taxes (Schedule 21, line 64);

c. a capitalization rate of 14% is appropriate;

d. the "add-back" of the value of leased equipment is improper;

e. the value of Burlington Northern Railroad Company's computer software and assembled work force must be deducted from the unit value.

The Director's assessment of Burlington Northern's real property for the 1989 tax year was $98,726,000. As shown above, the fair market value of Burlington Northern's real property in Iowa does not exceed $69,039,000. Therefore, the ratio of the assessed value to the true market value of Burlington Northern's property in Iowa is 143%. The ratio must be reduced to no more than 100% by reducing the assessed value to $69,039,000, or a reduction of $29,687,000.

Gerald D. Bair, the Director of the Department of Revenue and Finance of Iowa, his agents, and those acting in concert or participation with him, are enjoined and restrained from the levy, collection, or assessment of ad

valorem taxes against Plaintiff Burlington Northern Railroad Company in the State of Iowa for the 1989 tax year as follows:

1. The Defendant is prohibited from assessing Burlington Northern's real property in Iowa at a ratio to its true market value exceeding the ratio of the assessed value of all other commercial and industrial real property in Iowa to the true market value of all such other commercial and industrial real property in Iowa. The highest permitted assessment is $69,039,000.

2. The Defendant is enjoined from adding the value of operating leased equipment to the unit value.

3. The Defendant is enjoined from using a capitalization rate in the income approach lower than 14%.

4. The Defendant is enjoined from taxing the value of the computer software and the value of the assembled work force.

The Clerk of Court is authorized and directed to enter judgment in accordance herewith.

IT IS SO ORDERED.
DATED this 9th day of November, 1993.

s/ William C. Stuart
WILLIAM C. STUART
SENIOR DISTRICT COURT JUDGE

APPENDIX E

BURLINGTON NORTHERN RAILROAD COMPANY,

Appellee,

v.

Gerald D. BAIR, Director of the Department of Revenue of Iowa,

Appellant.

No. 91-1838.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 13, 1991.

Decided Feb. 26, 1992.

Kathleen Allyn, Boise, Idaho, argued (C.A. Daw, on the brief), for appellant.

James McBride, Washington, D.C., argued (Richard Malm, Des Moines, Iowa, on the brief), for appellee.

Before BEAM, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

BEAM, Circuit Judge.

This case concerns an interlocutory appeal from a district court order granting Burlington Northern Railroad Company (BNRR) a preliminary injunction against Gerald D. Bair, Director of the Department of Revenue of Iowa. The injunction prohibits Bair and others from assessing, levying, or collecting certain Iowa property taxes. BNRR claims these actions violate section 306 of the Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, 54-55 (codified with some differences in language at 49 U.S.C. § 11503

(1988)).[1] Bair appeals, arguing, among other things, that the district court erred in deciding whether to grant the preliminary injunction by (1) applying a "reasonable cause" standard and (2) considering only BNRR's evidence. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

On July 27, 1990, BNRR filed a complaint against Bair in federal court, seeking a permanent injunction pursuant to section 306 of the 4-R Act,[2] prohibiting Bair and others

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[1] Section 306 of the 4-R Act was originally codified at 49 U.S.C. § 26c (1976), but was later recodified, with slight changes in language, at 49 U.S.C. § 11503 under an Act of Oct. 17, 1978, Pub.L. No. 95-473, § 11503, 92 Stat. 1337, 1445-46. The revising act, however, declared that its provisions merely "restate" existing laws and "may not be construed as making a substantive change in the laws replaced." Id. § 3(a), 92 Stat. at 1466. As such, the language of section 306 is still controlling and we find it most convenient simply to refer to section 306 in this opinion.

[2] Section 306 reads in pertinent part:

> [T]he district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that . . . no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to

from collecting the second half of BNRR's 1989 ad valorem taxes for Iowa BNRR alleged that the taxes, which Bair levied on behalf of Iowa, violated section 306's prohibition against discriminatory taxation of railroads. See 4-R Act § 306. The complaint only concerned the second half of BNRR's 1989 taxes because Iowa permits taxpayers to pay ad valorem taxes in two installments and the parties already had entered into a consent injunction regarding the first installment of BNRR's 1989 taxes.

The second installment of BNRR's 1989 ad valorem taxes was due on or before March 31, 1991. On February 13, 1991, BNRR moved for a preliminary injunction prohibiting collection of the taxes. The district court held a hearing to decide whether to grant BNRR's motion. At the hearing, both BNRR and Bair supported their respective positions with briefs and affidavits. Because we decline to address any factual issues in this opinion, we need not review the specific contents of the various documents.

In deciding whether to grant the preliminary injunction, the district court made two important rulings. First, the court ruled that a "reasonable cause" standard, as opposed to traditional equitable principles,[3] governed the

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all other commercial and industrial property in the same assessment jurisdiction.

4-R Act § 306.

[3] This court outlined the proper equitable considerations for determining whether an injunction should issue in Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir.1981): "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the

issuance of injunctions under section 306. The district court followed the Tenth Circuit's opinion in *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255, 260 (10th Cir.1981). Under the reasonable cause standard, the district court does not balance the equities between the parties, but, instead, simply determines whether reasonable cause exists to believe that a violation of the act has occurred. See id. at 260-61. Second, the district court ruled that only BNRR's evidence, and not Bair's, was relevant to its determination. Relying on this court's opinion in *Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council*, 821 F.2d 516, 517 (8th Cir.1987), the district court concluded that under the reasonable cause standard, an injunction should issue if facts exist which reasonably could support the movant's position, even if those facts are in dispute.

After reviewing BNRR's evidence, the district court held that BNRR had presented sufficient facts which could reasonably support its position that the 1989 ad valorem taxes for Iowa violated section 306. The district court, therefore, granted BNRR's motion for a preliminary injunction. For the reasons discussed below, we affirm the district court's first ruling, but reverse its second one, and remand for a new hearing with directions to consider all the evidence presented by both parties.

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injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id. at 113.

II. DISCUSSION

We begin by noting that the district court's decisions to apply a reasonable cause standard and to examine only BNRR's evidence in determining whether to grant BNRR a preliminary injunction under section 306, concern the interpretation and application of a federal statute. As such, our review of the district court's rulings is plenary. *Stevenson v. Stevenson Assocs. (In re Stevenson Assocs., Inc.,)*, 777 F.2d 415, 418 (8th Cir.1985).

A. Reasonable Cause Standard

Bair's initial claim on appeal is that the district court erred in applying a reasonable cause standard as opposed to traditional equitable principles in determining whether to grant BNRR an injunction under section 306. We disagree. Instead, we, like the Ninth Circuit before us, find the Tenth Circuit's analysis in *Lennen* persuasive. See *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir.), *cert. denied*, 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983) (citing *Lennen*, 640 F.2d at 259-61).

It is a well-established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction. See *United States v. City of San Francisco*, 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Lennen*, 640 F.2d at 259-260 (citing numerous cases). In such situations, it is not the role of the courts to balance the equities between the parties. The controlling issue is whether Congress has already balanced the equities and has determined that, as a matter of

public policy, an injunction should issue where the defendant is engaged in, or is about to engage in, any activity which the statute prohibits. See id. at 259. The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur. See id. at 261. Along with the Tenth and Ninth Circuits, we believe section 306 falls within the category of statutes that limit the traditional equitable discretion of the courts. The purpose of the 4-R Act was "to promote the revitalization of [the United States] railway system." 4-R Act § 101(a), 90 Stat. at 33. One of Congress's express policies in the statute was to "balance the needs of carriers, shippers, and the public." Id. § 101(b)(1). Congress considered the circumstances surrounding state taxation of railroads and declared that "[t]he levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction" constitutes "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Id. § 306, 90 Stat. at 54. Congress, therefore, weighed the potential equities between state and local governments and railroads in enacting the 4-R Act. By expressly providing for injunctive relief in section 306, Congress indicated that, as a matter of public policy, the equities supported such relief where a violation of the act has or is about to occur. The courts are not free to reweigh Congress's balancing of the policy considerations underlying section 306. See *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464, 107 S.Ct. 1855, 1861, 95 L.Ed.2d 404 (1987).

Bair urges us to reject the Tenth Circuit's analysis in Lennen, arguing that the decision conflicts with the United States Supreme Court's opinion in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). In *Romero-Barcelo*, the Navy was discharging ordnance into waters surrounding Puerto Rico without a permit as required by the Federal Water Pollution Control Act (FWPCA). The plaintiffs demanded an injunction, for which the FWPCA expressly provided, to prevent the Navy's continued violation of the statute. Id. at 306-07, 102 S.Ct. at 1800. The Supreme Court, however, held that the FWPCA does not require a district court to issue an injunction for every statutory violation, but, instead, allows the court to order relief it considers appropriate to secure compliance with the statute. Id. at 318, 102 S.Ct. at 1806. The Court emphasized that the FWPCA provided for a variety of remedies, including criminal fines and penalties as well as injunctions, and that the illegal discharge did not actually harm the quality of the water. The Navy's conduct, therefore, only violated a technical requirement of the FWPCA, not its underlying purpose. Id. at 314-15, 102 S.Ct. at 1804-05.

Romero-Barcelo held that a statute that expressly provides for equitable relief does not automatically restrict a district court's traditional equitable discretion. The Supreme Court recognized, nonetheless, that the Congress may impose such restrictions, either explicitly in the statute's text or implicitly in its scheme. Id. at 313. As an example, the Court discussed its opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). In *Hill*, the Supreme Court held that under the Endangered Species Act (ESA), a district court had to

issue an injunction prohibiting the completion of a dam that threatened to eliminate an endangered species, the snail darter, by destroying its critical habitat. Id. at 194, 98 S.Ct. at 2301. The *Romero-Barcelo* Court distinguished *Hill* by noting that the ESA contained a flat ban on the destruction of critical habitats, which represented a direct policy choice by Congress, and under the circumstances, only an injunction would have prevented a violation of the ESA's fundamental purpose. The ESA's language and statutory scheme, therefore, restricted the district court's equitable discretion and the court had no choice but to issue an injunction. Romero-Barcelo, 456 U.S. at 314, 102 S.Ct. at 1804. We believe that Bair's comparison between the 4-R Act and the FWPCA is inapposite. If any comparison is proper, it is between the 4-R Act and the ESA. Section 306 contains a flat ban on discriminatory taxation of railroads and the only form of relief available to prevent a violation of this ban is equitable. Moreover, a state that levies a discriminatory tax is not merely violating a technical provision of section 306; it is violating the very purpose of the section. As such, we do not agree with Bair's assertion that *Romero-Barcelo* undermines the analysis contained in Lennen and similar cases. On the contrary, we believe that the analysis of *Romero-Barcelo* supports *Lennen's* holding.

Consequently, we conclude that a district court should grant a preliminary injunction under section 306 where a plaintiff has shown reasonable cause for the

court to believe that a violation of the section has or is about to occur.[4]

The Eighth Circuit, in particular, has held that an injunction should issue under sections 10(j) and 10(l) where (1) reasonable cause exists to believe that a violation of the NLRA has occurred and (2) injunctive relief is just and proper. See *Minnesota Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265, 269 (8th Cir.1967) (section 10(j)); *Local Joint Bd., Hotel & Restaurant Employees & Bartenders Int'l Union v. Sperry*, 323 F.2d 75, 77 (8th Cir.1963) (section 10(l)).

Bair contends that a comparison between the NLRA and the 4-R Act is inappropriate because the Eighth Circuit standards for granting injunctions under sections 10(j) and 10(l) actually differ. According to Bair, *Sperry* adopted the reasonable cause standard under section 10(l), but *Minnesota Mining* rejected this standard in favor of traditional equitable principles under section 10(j). He explains the distinction by noting that section 10(j) does not contain the words "reasonable cause," while section 10(l) does. Compare NLRA § 10(j) with id. § 10(l). Finally,

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[4] The Lennen court adopted the phrase "reasonable cause" by analogizing section 306 to sections 10(j) and 10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(j), (l) (1988) (as amended by Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 149-50), which authorize district courts to enjoin, at the request of the National Labor Relations Board, alleged violations of the NLRA. See Lennen, 640 F.2d at 260. Courts generally have held that a preliminary injunction should issue under sections 10(j) and 10(l) where reasonable cause exists to believe that certain unfair labor practices have occurred. See, e.g., id. (citing cases from various circuits).

Bair infers that because section 306 also does not contain the words "reasonable cause," if any section of the NLRA should serve as a guide, it should be section 10(j), not section 10(l). Bair's analysis is flawed. *Minnesota Mining* does not reject reasonable cause as part of the standard for issuing injunctions under section 10(j). *Minnesota Mining* simply holds that reasonable cause alone is insufficient; injunctive relief also must be just and proper considering all the facts and circumstances of the case. *Minnesota Mining*, 385 F.2d at 269. In theory, this two-pronged standard is no different than the one contained in *Sperry*. In fact, the *Minnesota Mining* court cited *Sperry* in outlining the standard to be applied under section 10(j) and expressly noted that the standards applied under sections 10(j) and 10(l) are the same. Id. at 269 & n. 5. In practice, though, *Minnesota Mining* did consider traditional equitable principles, such as irreparable harm, in determining whether injunctive relief was just and proper. This interjection of traditional equitable principles into the just and proper prong appears to be an anomaly. The majority of other decisions have applied the prong far more narrowly. Compare *Minnesota Mining*, 385 F.2d at 272-73, with *Sperry*, 323 F.2d at 78-79; *Wilson ex rel. NLRB v. Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir.1974) (citing *Minnesota Mining*); *Hendrix ex rel. NLRB v. Amalgamated Meat Cutters & Butcher Workmen, Dist. Local 340*, 555 F.2d 175, 178 (8th Cir.1977); *Solien ex rel. NLRB v. United Steelworkers*, 593 F.2d 82, 86-87 (8th Cir.), cert. denied, 444 U.S. 828, 100 S.Ct. 54, 62 L.Ed.2d 36 (1979); *Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council*, 821 F.2d 516, 517-18 (8th Cir.1987).

We, however, need not resolve the potential inconsistency in the application of sections 10(j) and 10(l). Unlike these sections, section 306 contains no language granting the district court discretion to determine whether injunctive relief is "just and proper." Instead, section 306 directs the court to issue whatever injunctive relief "as may be necessary" to prevent a violation of the section. Compare NLRA § 10(j), (l) with 4-R Act § 306. The just and proper prong of the standard under sections 10(j) and 10(l), therefore, does not serve as a guide in interpreting section 306.

Moreover, we note that the comparison between section 306 and sections 10(j) and 10(l) is nothing more than a helpful analogy. As the result of litigation concerning sections 10(j) and 10(l) (section 10(l) in particular), the reasonable cause prong of the standard for issuing injunctions under these sections has become a well-developed alternative to traditional equitable principles. We adopt the reasonable cause prong as the alternative standard in the section 306 context because it is appropriate, not because our interpretation of sections 10(j) and 10(l) compels us to do so.

B. Relevant Evidence

Bair's next contention is that the district court erred in failing to consider his evidence when determining whether reasonable cause existed to believe that Iowa's 1989 ad valorem taxes levied against BNRR violated the 4-R Act. We agree. The district court's reliance on the conclusory language of Sharp ex rel. NLRB v. Omaha Bldg. & Constr. Trades Council, 821 F.2d 516 (8th

Cir.1987), is misplaced. In Sharp, this court held that a district court should examine only evidence presented by the petitioner in applying the reasonable cause standard under section 10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(l) (1988) (as amended by Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136, 149-50). Sharp, 821 F.2d at 517. Section 10(l) permits the National Labor Relations Board (NLRB) to petition a district court for a preliminary injunction prohibiting certain alleged unfair labor activities pending the NLRB's final resolution of the dispute. NLRA § 10(l).[5] The fundamental basis for Sharp's holding, however, is contained in earlier opinions. A brief review of these opinions reveals that the underlying reason for examining only the petitioner's evidence in applying the reasonable cause standard under section 10(l) does not apply under section 306.

The Sharp court relied primarily on two earlier Eighth Circuit decisions, Hendrix ex rel. NLRB v. International Union of Operating Eng'rs, Local 571, 592 F.2d 437 (8th Cir.1979), and Solien ex rel. NLRB v. United Steelworkers, 593 F.2d 82 (8th Cir.), cert. denied, 444 U.S. 828, 100 S.Ct. 54, 62 L.Ed.2d 36 (1979). In Hendrix, we emphasized that in applying the reasonable cause standard under section 10(l), the district court must defer to both

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[5] The standard for issuing injunctions under section 10(l) is actually two-fold: (1) reasonable cause must exist to believe that a violation of the NLRA exists and (2) injunctive relief must be just and proper. Sharp, 821 F.2d at 517. Only the reasonable cause prong of the standard concerns us here. See supra note 4.

the statutory interpretations and rational factual inferences of the NLRB. Hendrix, 592 F.2d at 442. In Solien, we reaffirmed our basic view that the role of the district court under section 10(l) is very limited. We held that this role does not extend to resolving the underlying dispute between the NLRB and the other party, but merely to examining whether the NLRB has reasonable cause to believe that a violation of the NLRA has occurred. Solien, 593 F.2d at 86-87.

In reaching its conclusion, the Solien court quoted from our decision in Hendrix ex rel. NLRB v. Amalgamated Meat Cutters & Butcher Workmen, Dist. Local 340, 555 F.2d 175, 178 (8th Cir.1977), which in turn quoted from our decision in Wilson ex rel. NLRB v. Milk Drivers & Dairy Employees Union, Local 471, 491 F.2d 200, 203 (8th Cir.1974). In Wilson, we explained that the district court must defer to the NLRB under section 10(l), because the determination of whether a violation of the NLRA actually has occurred "is reserved exclusively for the [NLRB] with review by the Court of Appeals." We expressly noted that an injunction under section 10(l) may be proper even where substantial conflict in the evidence exists. Id.

The Wilson court relied on an earlier decision as well, Local Joint Bd., Hotel & Restaurant Employees & Bartenders Int'l Union v. Sperry, 323 F.2d 75 (8th Cir.1963), in which we first adopted the reasonable cause standard under section 10(l), see id. at 77. In Sperry, we noted that any attempt by the district court to finally adjudicate whether a violation of the NLRA actually had occurred would " 'usurp the [NLRB's] function as the primary fact finder in cases arising under the [NLRA] and its function

as primary interpreter of the statutory scheme.' " Id. at 77 (quoting Schauffler ex rel. NLRB v. Local 1291, Int'l Longshoremen's Ass'n, 292 F.2d 182, 188 (3d Cir.1961)).

Sharp's holding, consequently, ultimately rests on the principle that the district court must defer to the NLRB on disputed matters under section 10(l) because the NLRB, not the district court, is the final adjudicator of disputed fact issues under the NLRA. This deference to an administrative agency's authority, not any inherent aspect of the reasonable cause standard, explains why the district court examines only the petitioner's evidence when applying the reasonable cause standard under section 10(l). As discussed above, the reasonable cause standard flows from Congress's decision to expressly authorize injunctive relief in an act. Deference to the petitioner under an act such as the NLRA, in contrast, stems from Congress's decision to grant primary fact-finding authority to the petitioner and not the court. The district court's reliance on Sharp, thus, is misplaced because unlike under the NLRA, the district court is the primary fact-finder under the 4-R Act. See 4-R Act § 306. As fact-finder, the district court does not owe special deference to the petitioner and, therefore, should consider all the evidence in applying the reasonable cause standard under section 306. A simple analogy between proceedings under the NLRA and those under the 4-R Act, further clarifies that the district court, as fact-finder under the 4-R Act, should consider evidence from both parties before deciding whether to grant a preliminary

injunction.[6] The NLRB, as fact-finder under the NLRA, presumably considers all the evidence available to it before deciding whether to seek a preliminary injunction. The NLRB then petitions the district court when it decides, after a preliminary investigation, that reasonable cause exists to believe that a violation of the NLRA has occurred. See NLRA § 10(l). The NLRB goes to the district court because it has no authority to issue an injunction on its own. The district court's role under section 10(l), therefore, is largely limited to granting injunctions where the NLRB's decision has a rational basis.[7] Thus, the court only examines the NLRB's evidence in determining whether reasonable cause exists. See Sharp, 821 F.2d at 517. Under section 306 of the 4-R Act, however, the district court has authority to find facts as well as grant injunctions. See 4-R Act § 306. The district court's role as fact-finder under the 4-R Act is directly comparable to the NLRB's role as factfinder under the NLRA. Just as the NLRB does under the NLRA, the district court should consider all the evidence available to it before deciding whether reasonable cause exists to believe that a violation of the 4-R Act has occurred.

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[6] BNRR contends that its position under section 306 is analogous to the NLRB's position under section 10(l). As this paragraph demonstrates, BNRR's analogy is seriously flawed. Its position is more comparable to that of a party who initially files a complaint with the NLRB, alleging that an unfair labor practice has occurred.

[7] Although the district court also has discretion to determine whether injunctive relief is just and proper, this discretion is limited in practice. See supra note 4.

III. CONCLUSION

Bair also raises various factual issues on appeal, but because we reverse the district court's ruling that it should only consider BNRR's evidence in deciding whether to grant a preliminary injunction, our examination of Bair's factual claims would be premature. We instead remand the case to the district court for further proceedings consistent with this opinion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

Civil No. 90-0406B

Burlington Northern Railroad Company,

Plaintiff,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Defendant.

RULING
GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION AND ORDER

On March 8, 1991, the undersigned heard Plaintiff, Burlington Northern Railroad Company's Motion For Preliminary Injunction. Having reviewed and considered the pleadings, affidavits and argument of counsel, I conclude that the preliminary injunctive relief sought by the plaintiff should be granted.

The proper standard for the issuance of injunctive relief under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, is the "reasonable cause" standard as set forth in *Atchison, Topeka & Santa Fe Railroad Company v. Lennen*, 640 F.2d 255, 260 (10th Cir. 1981). I have examined the authorities cited by the defendant urging the application of a different

standard for the issuance of an injunction, but I conclude that the standard as set forth in *Lennen* is appropriate.

In a similar context, the Eighth Circuit has held that "reasonable cause" exists to issue an injunction if there are facts which reasonably could support the movant's position, even if those facts are disputed. *Sharp v. Omaha Building & Construction Trades Council*, 821 F.2d 516, 517 (8th Cir. 1987). I am satisfied that Burlington Northern has met its burden of producing facts which reasonably could support its position, even though those facts are disputed, and I find that there is reasonable cause to believe that Section 306 has been or is about to be violated.

I have not, and I am not now deciding whether the plaintiff has shown a likelihood of success at the trial on the merits. Such a showing is not necessary under *Lennen*, and no inference should be drawn concerning the likelihood of success on the merits by the issuance of this injunction.

Defendant Bair's requests for supplemental findings of fact are denied.

IT IS THEREFORE ORDERED that the defendant, his agents, and those acting in concert or participation with him, are hereby enjoined and restrained from further assessing, levying or collecting from the plaintiff ad valorem tax payments for the second-half of tax year 1989, due on or before March 31, 1991.

IT IS FURTHER ORDERED that the plaintiff shall deposit the enjoined taxes into an interest-bearing escrow

account established through the mutual agreement of the parties, pending further order of this Court.

Entered this 26th day of March, 1991, at 8:30 o'clock a.m.

s/ Harold D. Vietor
HAROLD D. VIETOR, Chief Judge
United States District Court
Southern District of Iowa

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

No. 4:90CV-60406

Burlington Northern Railroad Company,

Plaintiff,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Defendant.

PRELIMINARY INJUNCTION ORDER

On September 20, 1990, the court entered a Consent Preliminary Injunction herein, whereby defendant, his agents and those acting in participation with him were enjoined and restrained from collecting more than 75% of the ad valorem tax payments assessed against the plaintiff for the first half of the tax year 1989.

On March 26, 1991, the court entered an additional Preliminary Injunction and Order on motion by plaintiff, resisted by defendant, whereby the entire second half payment for the tax year 1989 was enjoined. The Order of March 26, 1991, was appealed to the Eighth Circuit Court of Appeals which reversed and remanded for further proceedings. The court held a new hearing on June 4, 1992 and concluded by order dated July 1, 1992, that plaintiff was entitled to injunctive relief with the relief to be determined on the basis of a Burlington Northern

system value of $3.7 billion dollars and deduction of $672 million dollars in intangibles from such system value.

All of the funds previously enjoined have been deposited in an escrow account at Norwest Bank Iowa, National Association, with the total of such previously enjoined first and second half taxes being in the amount of $1,555,443.00 in tax. Pursuant to order of the court and the terms of the escrow agreement, such funds have been invested and have earned interest. The court is informed by the parties that the original assessed value of Burlington Northern in Iowa for 1989 was $98.726 million dollars. In accordance with the court's ruling dated July 1, 1992, the parties compute that tax attributable to $40.326 million of such value should be enjoined. This amount of assessed value represents 40.84638% of the total of first and second half year taxes for the tax year 1989. As a result $538,452 of the escrowed taxes and net earnings thereon should now be released and paid to the counties. The sum of $1,016,991 in tax should remain in escrow.

IT IS THEREFORE ORDERED that the Consent Preliminary Injunction Order herein dated September 20, 1990, and the ruling granting plaintiff's Motion For Preliminary Injunction and Order dated March 26, 1991, are hereby modified as provided herein.

IT IS FURTHER ORDERED that defendant, his agents and those acting in concert or participation with him are hereby enjoined or restrained from collecting more than 59.15362% of the ad valorem taxes levied against the plaintiff for the tax year 1989.

IT IS FURTHER ORDERED that the tax funds previously paid into escrow shall be continued therein subject to the jurisdiction of the court except that $538,452 of the principal amount of such escrow, plus earnings thereon less transaction costs and escrow agent fees, shall be released from escrow. Plaintiff shall prepare checks for the appropriate amount of tax plus earnings due to each taxing body and shall deliver such checks to defendant for delivery to the payees. Funds in the total amount of such checks shall be paid by the escrow agent to plaintiff contemporaneously with the delivery of checks to defendant.

Dated August 21, 1992.

WILLIAM C. STUART,
Senior Judge
Southern District of Iowa

APPROVED AS TO FORM:

RICHARD A. MALM
Attorney for Plaintiff

JAMES D. MILLER
Attorney for Defendant

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Civil No. 93-4029SIDM

Burlington Northern Railroad Company,

Appellee,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Appellant.

ORDER
DENYING PETITION FOR
REHEARING AND SUGGESTION
FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied. Judge Magill took no part in the consideration or decision of this case.

August 31, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX I

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"**SEC. 28.** (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally

applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that –

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law;

and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provision of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term –

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within

such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy;

and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

APPENDIX J

49 U.S.C. SECTION 11503

Tax discrimination against rail transportation property

(a) In this section –

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study) the court shall find, as a violation of this section –

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds that tax ratio rate applicable to taxable property in the taxing district.

APPENDIX K

PROPERTY TAXES BY TYPE OF TAXING AUTHORITY
SEVENTEEN-YEAR SUMMARY 1975-76 TO 1991-92
DEPARTMENT OF MANAGEMENT - LOCAL BUDGET DIVISION

	75-76	76-77	77-78	78-79	79-80	80-81	81-82	82-83	83-84	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92
PROPERTY TAX DOLLARS (IN THOUSANDS)																	
K-12 Schools	475,948	543,999	567,718	596,497	633,010	686,252	729,453	764,843	777,089	807,385	835,809	869,981	836,549	826,495	853,601	899,396	947,731
Counties	184,607	198,632	221,691	246,579	268,445	305,651	332,277	354,184	374,971	397,885	415,385	426,173	427,819	429,741	445,176	476,741	515,306
Cities	174,155	195,397	213,670	232,824	258,910	291,970	319,551	346,754	371,282	396,777	417,349	453,082	444,520	456,391	465,352	482,666	503,093
Merged Areas	15,543	21,560	18,753	19,399	20,941	22,514	24,437	26,102	29,072	30,941	32,285	33,955	35,431	33,287	34,752	36,958	37,508
Hospitals	10,888	12,964	14,180	15,130	16,439	18,284	19,311	20,490	21,219	22,451	22,765	22,882	25,591	26,212	27,288	29,219	30,622
Assossor	9,235	9,819	11,125	12,170	13,143	14,527	15,731	15,793	15,309	15,485	15,859	16,120	16,567	17,693	18,691	20,051	22,972
All Others	3,321	3,480	3,774	4,006	4,445	5,253	6,160	7,300	17,928	18,534	20,165	20,483	20,694	20,740	21,489	22,243	23,431
Total Levy	873,697	985,851	1,850,911	1,126,605	1,215,333	1,344,451	1,446,920	1,535,466	1,606,870	1,689,458	1,759,614	1,842,675	1,807,171	1,810,558	1,866,349	1,967,275	2,080,666
PERCENT OF TOTAL PROPERTY TAX DOLLARS																	
K-12 Schools	54.48	55.18	54.02	52.95	52.09	51.04	50.41	49.81	48.36	47.79	47.50	47.21	46.29	45.65	45.74	45.72	45.55
Counties	21.13	20.15	21.10	21.89	22.09	22.73	22.96	23.07	23.34	23.55	23.61	23.13	23.67	23.74	23.85	24.23	24.77
Cities	19.93	19.82	20.33	20.67	21.30	21.72	22.08	22.58	23.11	23.49	23.72	24.59	24.60	25.21	24.93	24.53	24.18
Merged Areas	1.78	2.19	1.78	1.72	1.72	1.67	1.69	1.70	1.81	1.83	1.83	1.84	1.96	1.84	1.86	1.88	1.80
Hospitals	1.25	1.32	1.35	1.34	1.35	1.36	1.33	1.33	1.32	1.33	1.29	1.24	1.42	1.45	1.46	1.49	1.47
Assessors	1.06	1.00	1.06	1.08	1.08	1.08	1.09	1.03	0.95	0.92	0.90	0.87	0.92	0.98	1.00	1.02	1.10
All Others	0.38	0.35	0.36	0.36	0.37	0.39	0.43	0.48	1.12	1.10	1.15	1.11	1.15	1.15	1.15	1.13	1.13
Total Levy	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
PERCENT CHANGE FROM PRECEDING YEAR																	
K-12 Schools		14.30	4.36	5.07	6.12	8.41	6.30	4.85	1.60	3.90	3.52	4.09	-3.84	-1.20	3.28	5.36	5.37
Counties		7.60	11.61	11.23	8.87	13.86	8.71	6.59	5.87	6.11	4.40	2.60	0.39	0.45	3.59	7.09	8.09
Cities		12.20	9.35	8.96	11.20	12.77	9.45	8.51	7.07	6.87	5.18	8.56	-1.89	2.67	1.96	3.72	4.23
Merged Areas		38.71	-13.02	3.44	7.95	7.51	8.54	6.81	11.38	6.43	4.34	5.17	4.35	-6.05	4.40	6.35	1.49
Hospital		19.07	9.38	6.70	8.65	11.22	5.62	6.11	3.56	5.81	1.40	0.51	11.84	2.43	4.10	7.08	4.80
Assessors		6.32	13.30	9.39	8.00	10.53	8.29	0.39	-3.06	1.15	2.42	1.65	2.77	6.80	5.64	7.28	14.57
All Others		4.79	8.45	6.15	10.96	18.18	17.27	18.51	145.59	3.38	8.80	1.58	1.03	0.22	3.61	3.51	5.34
Total Levy		12.84	6.60	7.20	7.88	10.62	7.62	6.12	4.65	5.14	4.15	4.72	-1.93	0.19	3.08	5.41	5.76
Tax Value		31.07	3.23	5.04	8.34	7.92	6.16	6.31	4.84	4.92	4.91	4.22	-2.32	-2.83	0.62	0.71	1.05
MISCELLANEOUS INFORMATION (TAX VALUES IN THOUSANDS)																	
Tax Value	32964681	43206313	44599770	46845495	50752593	54770584	5584232	61813334	64802781	67992946	71332026	74344379	72622770	70564328	71001266	71506890	72256797
Average Rate	26.50403	22.81729	23.56315	24.04938	23.94622	24.54695	24.84037	24.88583	24.7931	24.84755	24.66794	24.78567	24.88436	25.65826	26.28614	27.51168	28.79544

ALL OTHERS INCLUDES AG EXTENSION, TOWNSHIPS, SANITARY DISTRICTS, STATE, AND FIRE, WATER, AND STREET LIGHTING DISTRICE.
FIRE, WATER, AND STREET LIGHTING FIRST INCLUDED IN 1981-82. TOWNSHIPS FIRST INCLUDED IN 1983-84. STATE INCLUDED IN 1985-86.
TIF REVENUES ADDED TO CITIES BEGINNING 1986-87. PERSONAL PROPERTY NOT TAXED BEGINNING FY87-88.
TOTALS MAY NOT ADD DUE TO ROUNDING.

STATEWIDE PROPERTY TAXES BY CLASS OF PROPERTY
ASSESSMENT DATES 1/1/77 TO 1/1/90

ASSESS YEAR	RESIDENTIAL	AGRICULTURAL LAND	AGRICULTURAL BUILDINGS	COMMERICAL	INDUSTRIAL	PERSONAL
1977	414,085,083	280,013,285	67,312,751	147,405,368	65,409,743	67,680,297
1978	431,026,123	293,647,945	76,295,012	177,917,108	79,414,010	67,368,157
1979	480,486,075	317,929,576	86,216,371	199,070,430	88,572,534	68,792,117
1980	520,297,331	335,190,775	95,710,166	216,419,027	76,777,249	69,883,717
1981	615,110,254	356,301,630	42,569,048	229,672,274	56,638,260	69,178,973
1982	643,976,827	370,241,563	45,316,110	244,304,418	64,532,415	68,898,912
1983	673,685,157	393,510,867	41,256,662	259,937,632	65,228,223	68,939,602
1984	703,985,266	403,312,992	43,634,626	274,270,743	69,521,242	68,541,212
1985	740,574,108	417,235,620	41,224,532	292,312,135	68,842,996	68,616,884
1986	747,178,334	418,418,594	42,667,648	305,208,228	69,370,153	0
1987	768,551,433	384,996,039	39,632,460	311,780,032	69,362,597	0
1988	793,416,741	396,411,056	41,072,309	325,706,890	72,787,377	0
1989	835,609,891	406,648,678	42,949,570	349,285,105	77,568,904	0
1990	881,455,173	428,237,802	45,752,963	370,530,673	82,530,486	0

ASSESS YEAR	PERSONAL REAL	UTILITIES	OTHER	GROSS TOTAL	LESS MILITARY	SPECIAL	NET TAXABLE
1977	0	94,561,586	371,004	1,136,839,117	13,827,558	0	1,123,011,559
1978	0	102,928,910	328,968	1,228,926,233	13,802,146	0	1,215,124,087
1979	0	115,019,688	269,711	1,356,536,502	13,978,644	0	1,342,557,858
1980	25,141,206	120,409,993	306,066	1,460,135,530	14,026,244	905,672	1,447,014,958
1981	54,358,262	124,082,726	258,885	1,548,170,312	13,784,629	1,079,544	1,535,465,227
1982	54,204,447	127,242,154	234,137	1,618,950,983	13,711,942	1,633,593	1,606,872,634
1983	59,584,160	137,075,165	214,166	1,699,431,634	13,695,968	3,700,768	1,689,436,434
1984	58,236,274	148,288,031	287,186	1,770,077,572	13,569,640	3,098,515	1,759,606,247
1985	65,992,998	147,628,234	292,854	1,842,650,361	13,375,464	13,400,014	1,842,674,911
1986	63,839,851	159,239,889	305,117	1,806,227,812	13,149,811	14,092,695	1,807,170,896
1987	59,722,459	176,279,369	282,681	1,810,607,070	13,207,287	13,158,278	1,810,558,061
1988	59,510,402	176,433,107	297,828	1,865,635,710	13,256,473	13,970,031	1,866,349,268
1989	62,581,395	189,501,703	240,641	1,964,385,887	13,561,366	16,450,481	1,967,275,002
1990	66,623,785	198,569,112	294,552	2,073,994,546	13,914,530	20,585,831	2,080,665,847

PERCENT OF STATEWIDE PROPERTY TAX, BY CLASS OF PROPERTY
ASSESSMENT DATES 1/1/77 TO 1/1/90

ASSESS YEAR	RESIDENTIAL	AGRICULTURAL LAND	AGRICULTRUAL BUILDINGS	COMMERICAL	INDUSTRIAL	PERSONAL	PERSONAL REAL	UTILITIES	OTHER	LESS MILITARY	SPECIAL	NET TAXABLE
1977	36.87	24.93	5.99	13.13	5.82	6.03	0.00	8.42	0.03	-1.23	0.00	100.00
1978	35.47	24.17	6.28	14.64	6.54	5.54	0.00	8.47	0.03	-1.14	0.00	100.00
1979	35.79	23.68	6.42	14.83	6.60	5.12	0.00	8.57	0.02	-1.04	0.00	100.00
1980	35.96	23.16	6.61	14.96	5.31	4.83	1.74	8.32	0.02	-0.97	0.06	100.00
1981	40.06	23.20	2.77	14.96	3.69	4.51	3.54	8.08	0.02	-0.90	0.07	100.00
1982	40.08	23.04	2.82	15.20	4.02	4.29	3.37	7.92	0.01	-0.85	0.10	100.00
1983	39.88	23.29	2.44	15.39	3.86	4.08	3.53	8.11	0.01	-0.81	0.22	100.00
1984	40.01	22.92	2.48	15.59	3.95	3.90	3.31	8.43	0.02	-0.77	0.18	100.00
1985	40.19	22.64	2.24	15.86	3.74	3.72	3.58	8.01	0.02	-0.73	0.73	100.00
1986	41.35	23.15	2.36	16.89	3.84	0.00	3.53	8.81	0.02	-0.73	0.78	100.00
1987	42.45	21.26	2.19	17.22	3.83	0.00	3.30	9.74	0.02	-0.73	0.73	100.00
1988	42.51	21.24	2.20	17.45	3.90	0.00	3.19	9.45	0.02	-0.71	0.75	100.00
1989	42.48	20.67	2.18	17.75	3.94	0.00	3.18	9.63	0.01	-0.69	0.84	100.00
1990	42.36	20.58	2.20	17.81	3.97	0.00	3.20	9.54	0.01	-0.67	0.99	100.00

STATEWIDE PROPERTY TAXES BY CLASS OF PROPERTY
ASSESSMENT DATES 1/1/77 TO 1/1/90

ASSESS YEAR	RESIDENTIAL	AGRICULTURAL LAND	AGRICULTURAL BUILDINGS	COMMERICAL	INDUSTRIAL	PERSONAL
1977	14,397,057,521	15,299,866,597	3,527,020,868	4,940,953,422	2,344,792,501	2,745,404,092
1978	15,170,167,971	16,017,857,997	3,974,173,099	6,048,750,071	2,871,051,268	2,747,629,395
1979	16,488,406,595	17,012,052,699	4,402,556,688	6,662,932,798	3,142,681,039	2,750,473,406
1980	17,646,127,520	17,690,061,276	4,828,229,685	7,176,869,169	2,681,298,775	2,751,814,785
1981	21,761,401,250	18,817,447,591	2,167,064,945	7,685,026,802	2,007,868,188	2,748,523,550
1982	22,908,459,912	19,591,408,134	2,310,876,711	8,214,317,483	2,285,515,112	2,745,689,479
1983	24,011,855,826	20,722,880,085	2,116,592,728	8,758,733,056	2,284,013,579	2,743,542,344
1984	25,221,322,864	21,552,647,993	2,267,206,945	9,260,353,397	2,441,969,847	2,742,671,802
1985	26,521,715,034	22,558,163,609	2,182,799,255	9,816,674,040	2,419,924,835	2,746,010,417
1986	26,763,951,568	22,475,747,065	2,246,951,697	10,229,339,981	2,435,531,414	0
1987	27,010,539,430	20,050,274,670	2,026,231,208	10,283,974,252	2,401,436,421	0
1988	27,296,367,990	20,037,887,849	2,039,551,339	10,516,448,456	2,475,083,642	0
1989	27,655,846,303	19,550,657,877	2,029,321,408	10,859,969,888	2,547,315,757	0
1990	28,066,526,118	19,522,772,060	2,041,976,701	11,113,332,507	2,606,261,792	0

ASSESS YEAR	PERSONAL REAL	UTILITIES	OTHER	GROSS TOTAL	LESS MILITARY	NET TAXABLE
1977	0	4,076,594,713	13,955,478	47,345,645,192	500,813,790	46,844,831,402
1978	0	4,413,506,222	12,451,605	51,255,587,628	502,994,362	50,752,593,266
1979	0	4,799,145,956	10,578,674	55,268,827,855	498,243,412	54,770,584,443
1980	839,532,272	5,010,385,051	11,381,778	58,63,570,0311	493,367,892	58,142,332,419
1981	1,889,048,144	5,215,981,796	9,749,076	62,302,111,342	488,777,154	61,813,334,188
1982	1,879,889,110	5,346,179,531	8,770,739	65,291,106,211	488,325,247	64,802,780,964
1983	2,084,440,026	5,749,504,028	7,195,453	68,478,757,125	485,811,094	67,992,946,031
1984	2,058,854,596	6,261,183,794	10,143,043	71,816,354,299	484,328,613	71,332,025,686
1985	2,340,879,362	6,224,946,088	10,022,585	74,821,135,225	476,755,981	74,344,379,244
1986	2,254,523,767	6,674,298,945	10,376,976	73,090,121,413	467,351,023	72,622,770,390
1987	2,071,250,974	7,171,749,352	9,026,704	71,024,483,011	460,155,238	70,564,327,773
1988	2,040,765,517	7,037,517,284	9,672,930	71,453,295,007	452,028,740	71,001,266,267
1989	2,069,722,458	7,230,800,752	7,876,963	71,951,511,906	444,622,286	71,506,889,620
1990	2,120,244,879	7,214,748,667	9,054,206	72,694,916,930	438,120,074	72,256,796,856

PERCENT OF NET TAXABLE VALUATION, CLASS OF PROPERTY, 1977-1990

ASSESS YEAR	RESIDEN-TIAL	AGRICULTURAL LAND	AGRICULTURAL BUILDINGS	COMMER-CIAL	INDUS-TRIAL	PERSONAL	PERSONAL REAL	UTILITIES	OTHER	GROSS TOTAL	LESS MILITARY	NET TAXABLE
1977	30.73	32.66	7.53	10.55	5.01	5.86	0.00	8.70	0.03	101.07	-1.07	100.00
1978	29.89	31.56	7.83	11.92	5.66	5.41	0.00	8.70	0.02	100.99	-0.99	100.00
1979	30.10	31.06	8.04	12.17	5.74	5.02	0.00	8.76	0.02	100.91	-0.91	100.00
1980	30.35	30.43	8.30	12.34	4.61	4.73	1.44	8.62	0.02	100.85	-0.85	100.00
1981	35.21	30.44	3.51	12.43	3.25	4.45	3.06	8.44	0.02	100.79	-0.79	100.00
1982	35.35	30.23	3.57	12.68	3.53	4.24	2.90	8.25	0.01	100.75	-0.75	100.00
1983	35.32	30.48	3.11	12.88	3.36	4.04	3.07	8.46	0.01	100.71	-0.71	100.00
1984	35.36	30.21	3.18	12.98	3.42	3.84	2.89	8.78	0.01	100.68	-0.68	100.00
1985	35.67	30.34	2.94	13.20	3.26	3.69	3.15	8.37	0.01	100.64	-0.64	100.00
1986	36.85	30.95	3.09	14.09	3.35	0.00	3.10	9.19	0.01	100.64	-0.64	100.00
1987	38.27	28.41	2.87	14.57	3.40	0.00	2.94	10.16	0.01	100.65	-0.65	100.00
1988	38.44	28.22	2.87	14.81	3.49	0.00	2.87	9.91	0.01	100.64	-0.64	100.00
1989	38.68	27.34	2.84	15.19	3.56	0.00	2.89	10.11	0.01	100.62	-0.62	100.00
1990	38.84	27.02	2.83	15.38	3.61	0.00	2.93	9.98	0.01	100.61	-0.61	100.00

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civil No. 93-549-PHX-RGS
Civil No. 93-553-PHX-RGS
Civil No. 93-1526-PHX-RGS
CONSOLIDATED

Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation,

Plaintiff,

v.

State of Arizona, et al.,

Defendant,

---

and Consolidated Cases

ORDER

The plaintiffs[1] seek injunctive relief under the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). 49 U.S.C. § 11503. The Complaint alleges that a portion of Arizona's tax scheme unfairly discriminates against railroad carriers. Specifically, the Complaint seeks to enjoin the defendants from imposing, levying, assessing or collecting from plaintiffs the state and city/town transaction privilege tax ("TPT"), A.R.S. § 42-1317 or the

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[1] Plaintiffs are the Atchison, Topeka and Santa Fe Railway Company; Southern Pacific Transportation Company; and Arizona Central Railroad, Inc.

state use tax, with respect to purchases of diesel fuel and railway maintenance materials, A.R.A. § 42-1401.

Defendants Arizona Department of Revenue, City of Phoenix and Town of Clifton moved for summary judgment. Plaintiffs responded and filed a cross motion for summary judgment. The Court makes the following decision based upon the pleadings presented and oral argument of the parties.

Federal Regulation

49 U.S.C. § 11503 prohibits states from taxing rail transportation in a discriminatory manner. Congress enacted the 4-R Act in part to "restore the financial stability of the railway system of the United States." *Department of Revenue of Oregon v. ACF Industries*, 1994 WL 13660, at *3 (S.Ct. Jan. 24, 1994) (citing § 101(a), 90 Stat. 33). The *ACF* Court further noted that Congress was aware that the railroads " 'are easy prey for State and local tax assessors in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality.' " *Id.* (quoting *Western Air Lines, Inc. v. Board of Equalization*, 107 S.Ct. 1038, 1042 (1987) (quoting S. Rep. No. 91-630, p.3 (1969)).

The relevant provisions of § 11503 are contained in subsection (b):

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . .

> (4) impose another tax that discriminates against a rail carrier providing transportation . . . .

49 U.S.C. § 11503(b)(4).[2]

Subsections (b)(4) prohibits "any other tax" that "discriminates" against railroads. Subsection (b)(4) is a catch-all to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. *Burlington Northern v. City of Superior, Wis.*, 932 F.2d 1185 (7th Cir. 1991).

In a 4-R case, the railroads need to establish that the tax is discriminatory, after which the tax must be justified, if possible, by the state. *Kansas City Railway Co. v. McNamara*, 817 F.2d 368, 376 (5th Cir. 1987).

DISCUSSION

The Arizona TPT is imposed on entities engaging in numerous business activities within 18 specific classifications.[3] Railroads and airlines fall within the transportation classification of the TPT. There are 15 entities within the transportation classification. A.R.S. § 42-1310.01-.18.

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[2] Subsections (b) (1)-(3) forbids the imposition of higher assessment ratios or tax rates upon rail transportation property than upon "other commercial and industrial property."

[3] The activities subject to the TPT include: retail sales, transporting, utilities, telecommunications, publication, job printing, pipelines, private car lines, commercial lease, transient lodging, personal property rental, mining, amusement, restaurant, animal feed, prime contracting, owner-builder sales and membership camping. A.R.S. § 42-1310.01-.18.

Plaintiffs argue that there are three ways the TPT discriminates against rail carriers under 49 U.S.C. § 11503 (b)(4):

> 1. the tax scheme is facially discriminatory of the class of taxpayers is unnecessarily small, *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 376 (5th Cir. 1987); *Trailer Train Co. v. State Tax Com'n*, 929 F.2d 1300, 1303 (8th Cir. 1991);
>
> 2. the tax scheme provides exemptions or credits to other taxpayers which are unavailable to the railroads, *ACF Industries v. Department of Revenue*, 961 F.2d 813, 822 (9th Cir. 1992);[4] and
>
> 3. the tax scheme creates anticompetitive effects, *Burlington Railroad Co. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988; *Atchison Topeka and Santa Fe Railway Co. v. Bair*, 338 N.W. 2d 338 (Iowa 1983).

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[4] The Ninth Circuit had found that Oregon's taxing scheme violated subsection (b)(4) because 100% of the railroad's property was subject to ad valorem tax, while 25% of non-railroad property was exempt from that tax. *ACF Industries v. Dept. of Revenue of State of Oregon*, 961 F.2d 813, 822 (9th Cir. 1992). Thus, the Ninth Circuit held that "any exemption not also available to railroads violates that statute." *Id.* (citing *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981)). The Ninth Circuit's decision in *ACF* was reversed by the Supreme Court finding that the taxes at issue were property taxes, not "other taxes." *Department of Revenue of Oregon v. ACF Industries*, 1994 WL 13660 (S.Ct. Jan. 24, 1994). The *ACF* Court held that § 11503 does not limit the States' discretion to exempt non-railroad property, but not railroad property, from ad valorem property taxes of general application. *Id.* Plaintiffs no longer rely on *ACF* in support of their position.

The two circuit decisions to discuss non property tax schemes under § 11503 (b)(4) looked for evidence of facial discrimination and the size of the class of taxpayers affected by the challenged tax. The *Trailer Train* court found that Missouri's private car tax violated subsection (b)(4) because it applied only to one class of business, the railroads. Similarly, in *Kansas City* the Fifth Circuit found that Louisiana's gross receipts tax on transportation utilities violated subsection (b)(4) because "the class of taxpayers included in the tax is unnecessarily small". *Kansas City*, at 376. A tax should be distributed over a large base of similarly situated taxpayers who have sufficient political voice to have their opinion heard.

In this case, the parties disagree about which comparative class should be used to determine whether the class is unnecessarily small: plaintiffs argue that the transportation classification and specifically plaintiffs' competitor, is the appropriate comparison group citing *Burlington Northern Railroad Co. v. Commissioner of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993); defendants contend that the business activities class (the entire TPT class) is the relevant class. However, defendants argue that the evidence demonstrates that under either the TPT or the transportation classification there is a sufficiently large taxable group to be nondiscriminatory.[5]

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[5] If the entire group of taxpayers subject to the TPT is considered the proper class there are 146,981 statewide, 41,392 and 96 people and/or entities subject to the TPT in the Cities of Phoenix and Clifton respectively. Revenues of $193,950,067 were collected from this class in 1992. The Santa Fe and Southern Pacific railroads paid $650,995 for fiscal year 1992.

Plaintiffs contend that because the defendants collect and administratively account for each classification of the tax, there are eighteen separate taxes, rather than one tax with eighteen classifications – transportation being just one of the classifications. The evidence presented demonstrates that taxpayers under different classifications within the TPT can be and are taxed at different rates. In other words, tax rates and exemptions are available to certain categories of taxpayers within the TPT that are not available to railroads. Nevertheless, the Court makes no specific findings with respect to whether the TPT is a single tax or 18 separate taxes.

Defendants previously argued at the preliminary injunction hearing that a tax is not "discriminatory" unless it puts the railroad at a competitive disadvantage. Although the Northern District of California court held that the prohibition of subsection (b)(4) does not require a showing of competition among taxed entities, anticompetitive effect is a relevant consideration and the railroad's competitors should be the comparison class. *Burlington Northern Railroad Co. Commissioner of Revenue*, 509 N.W.2d 551 (Minn. 1993); *Nat. R.R. Pass. Corp. v. Cal. Bd. of Equalization*, 652 F.Supp. 923 (N.D.Cal. 1986). Having reviewed the relevant case law presented by the parties, the Court finds that the applicable comparison group is the railroads' competitor, the motor carriers.

If the transportation classification is the relevant class for comparative purposes, there are 715 entities and/or individuals who filed TPT returns and $3,287,464.00 was collected. The railroad/aircraft group paid $1,471,712.00 of the total collected, approximately 49%.

Plaintiffs also argue that the use of the alternative tax revenues structure that motor carriers are subjected to and that go to build highways and roads is discriminatory because the railroads must construct and maintain the railroad beds without state assistance. The plaintiffs cite *Burlington Northern R. Co. v. Triplett*, 682 F.Supp. 443 (D.Minn. 1988), in support of their argument. The District of Minnesota found that the dedication of taxes for highway use was discriminatory because it gave "the trucks a distinct competitive advantage". *Id.* at 446.

Defendants argue that the railroads are not disadvantaged because motor carriers are taxed under a different scheme, i.e., motor carriers are not taxed under the Title 42 use tax, but rather are subject to similar, perhaps higher, taxation under Title 28. This distinction is not a relevant inquiry. *McNamara*, 817 F.2d at 377. At issue is whether the exemption of motor carriers as the competitors of the railroads is discriminatory and on its face the taxation scheme is: the taxation scheme exempts from taxation the railroad's competitor. The state taxing scheme discriminates against railroads by imposing a tax on railroads that its principal competitor, motor carriers, are expressly exempted from within the category of the transaction privilege tax.

The plaintiffs allege that the state use tax is discriminatory as well. A.R.S. § 42-1408. The railroads' primary argument is that motor carrier fuel purchases are exempt from the tax, thereby giving motor carriers a competitive advantage. The railroads are one of numerous industrial and commercial taxpayers who must comply with the state use tax while motor carriers are exempt. For the

reasons discussed above, the specific application of the use tax on diesel fuel is discriminatory.

Based upon the evidence presented, the Court will grant plaintiffs' motion for summary judgment finding that as a matter of law the state transaction privilege and use taxes are discriminatory as applied against plaintiffs and violate the statutory provisions of the 4-R Act and will deny defendant's motion for summary judgment.

Also pending before the court are plaintiffs' motion to extend 42(C) compliance, defendant's motion for protective order and plaintiffs' motion for leave to serve additional interrogatories. Having ruled on the dispositive issues, the motions are moot.

Accordingly,

IT IS ORDERED denying defendant's motion for summary judgment. [doc. #43].

FURTHER ORDERED granting plaintiffs' cross-motion for summary judgment. [doc. #61].

FURTHER ORDERED that the parties prepare and submit a form of judgment to be entered by the Court within 20 days.

FURTHER ORDERED denying as moot plaintiffs' motion to extend 42(C) compliance [doc. #51]; defendant's motion for protective order [doc. #54]; and plaintiffs' motion for leave to serve additional interrogatories [doc. #55].

DATED this 7th day of March, 1994.

s/ Roger G. Strand
Honorable Roger G. Strand
U.S. District Court Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Judge Daniel B. Sparr

Civil No. 95-8-472

Burlington Northern Railroad Company,

Plaintiff,

v.

Mary E. Huddleston, in her capacity as Property Tax Administrator of the State of Colorado; and the Division of Property Taxation of the Division of Local Affairs of the State of Colorado,

Defendant.

ORDER

THIS MATTER comes before the Court on Defendants' Motion to Dismiss, filed March 17, 1995, and Plaintiff's Motion and Legal Authorities for Preliminary Injunction filed April 10, 1995. The Court has reviewed Defendants' motion, Plaintiff's response to Defendants' motion, Plaintiff's motion, the applicable law and is fully advised in the premises. Magistrate Judge Abram has informed the Court that the parties have requested that the case be decided on the pleadings as submitted. The Court finds that a hearing would not materially assist it and therefore makes the following findings and enters this Order.

Plaintiff's complaint requests a permanent injunction and declaratory judgment regarding state taxes imposed

by Defendants on computer software belonging to Burlington Northern (BN). Computer software is included in the definition of intangible personal property that is exempt from the levy and collection of property taxes pursuant to C.R.S. § 39-3-117. Defendants deny the computer software exemption to public utilities, which include Plaintiff. BN argues that the taxes are discriminatory pursuant to 49 U.S.C. § 11503(b)(4) and Defendants should be enjoined from collecting them for that reason.

Motion to Dismiss

Defendants' Motion to Dismiss alleges three grounds as bases that Plaintiff's complaint should be dismissed – that the court lacks subject matter jurisdiction, that the complaint fails to state a claim pursuant to § 11503(b)(4) and that the complaint is barred by the Eleventh Amendment.

Defendants' first argument is that the Court lacks subject matter jurisdiction because the statute itself and *Department of Revenue v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994) [hereinafter *ACF*] limit jurisdiction. Section 11503(b) has four subsections that forbid states from doing certain things which discriminate against railroads in terms of taxes. The first three provisions are quite specific while the fourth is a catch-all provision which prohibits all other types of discrimination. Defendants argue that the court has jurisdiction only over two discrete subjects referred to subsections (b)(1)-(3). Defendants ignore the mandate of subsection (b)(4) which

prohibits a state from "impos[ing] another tax that discriminates against a rail carrier providing transportation." Defendants' argument relying on *ACF* misreads the Court's ruling in that case. While the Court ruled on the application of exemptions to § 11503(b), it did not limit the jurisdiction of district courts to hear claims of discrimination regarding § 11503(b).

Defendants' third argument is that Plaintiff's complaint is barred by the Eleventh Amendment. This argument is without merit. Congress can choose to override the Eleventh Amendment's prohibition on suits against a state to safeguard competing constitutional rights such as those exhibited in § 11503. *Fox River Valley R.R. v. Dept. of Rev. of Wisconsin*, 863 F. Supp. 893 (E.D. Wisc. 1994).

Defendants' fourth argument, which is based on 28 U.S.C. § 1341 and the doctrine of comity, is also without merit. Section 11503(c) includes a specific exception to the application of 28 U.S.C. § 1341. Plaintiff alleges a violation of § 11503(b) and subsection (c) clearly gives district courts jurisdiction to hear such cases. In addition, the United States Supreme Court has addressed Defendants' comity argument and rejected it. "These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now." *Burlington Northern Railway Co. v. Oklahoma Tax Com'n.*, 107 S.Ct. 1855, 1861 (1987).

Finally, Defendants' second argument is that Plaintiff's complaint fails to state a claim pursuant to § 11503(b)(4) upon which relief can be granted. This argument goes to the merits of the case and therefore will

be considered in conjunction with Plaintiff's motion for preliminary injunction.

Motion for Preliminary Injunction

The district court is authorized to grant injunctive relief to prevent, restrain or terminate violations of § 11503(b). *Atchison, T. & S.F. Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981).

> When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm need not be shown. . . . [W]here the trial court finds reasonable cause to believe that a violation of § 11503(b) has been, or is about to be, committed, an injunction should be granted to prevent that violation.

Id. at 259-60.

The parties have raised many arguments in their pleadings but the issue before this Court is a narrow one: is the failure of Defendants to apply the tax exemption in C.R.S. § 39-3-118 to Plaintiff discrimination under 49 U.S.C. § 11503(b)(4)?

Defendants argue that Plaintiff's complaint is mooted by the U.S. Supreme Court's recent pronouncements in *ACF*. In that case, the Supreme Court dealt with the issue of whether § 11503(b)(4) was violated by the imposition of a tax on certain railroad property while some other commercial and industrial property was exempt. The Court found that "a State may grant exemptions from a

generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge" under § 11503(b). 114 S.Ct. at 846. The Court reasoned that although exemptions could be a "variant of discrimination," there were reasons to limit the consideration of exemptions when addressing claims of discrimination under § 11503(b). *Id.* at 850. These include the lack of language in the statute addressing exemptions, along with the Court's reluctance to extend a statute which impinges on States' traditional powers beyond its evident scope.

While the Court declined to consider exempt property in determining the appropriateness of the taxes at issue in that case, it specifically did not rule out the consideration of any exemptions. The opinion was limited to exemptions of "general application" which did not "single out" railroad property. *Id.* at 852. "[T]his is not a case in which the railroads – either alone or as part of some isolated and targeted group – are the only commercial entities subject to an ad valorem property tax." *Id.* at 851. The Court stated that "we need not decide whether subsection (b)(4) would prohibit a tax of that nature." *Id.* at 852.

That leads this Court to question of whether the tax applicable in this case applies only to an isolated and targeted group. As previously stated, the exemption in C.R.S. § 39-3-117 is denied by Defendants to public utilities. Public utilities are defined by C.R.S. § 39-4-101. They include railroad companies, airline companies, electric companies, rural electric companies, telephone companies, telegraph companies, gas companies, gas pipeline carrier companies, domestic water companies selling at

retail except for nonprofit domestic water companies, pipeline companies, coal slurry pipeline companies, and private car line companies.

The property taxes of public utilities are assessed by the property tax administrator of the state of Colorado. C.R.S. § 39-1-103(3). Property tax for all other real and personal property is determined by the assessor of the county wherein the property is located. C.R.S. § 39-1-103(5). Consequently, property tax for public utilities is centrally assessed while property taxes for all other entities is locally assessed.

As stated by Plaintiff, caselaw prior to the U.S. Supreme Court's pronouncement in *ACF* discussed the application of taxes and/or exemptions to small groups of taxpayers in light of § 11503(b). These cases come from a variety of circuits and some of them have had *cert.* denied by the Supreme Court.

The Eighth Circuit has dealt with railroad tax issues extensively. One of the most often cited cases is *Ogilvie v. State Board of Equalization,* 657 F.2d 204 (8th Cir.), *cert. denied,* 102 S.Ct. 644 (1981). That case dealt with four classes of property for taxation purposes in North Dakota – three locally assessed and one state, or centrally, assessed. Locally assessed personal property was exempt from taxation while centrally assessed personal property was not exempt. The Eighth Circuit found that this was in violation of § 11053(b)(4).

> The intent of Congress in enacting [§ 11503] was to protect interstate rail carriers from discriminatory property taxation. The most obvious form of tax discrimination is to impose a tax on

> a class of rail transportation property that is not imposed on nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed business that is not imposed on locally assessed businesses.

Id. at 210.

The Eighth Circuit also dealt with a case of exemptions that excluded railroad property in *Trailer Train Co. v. Leuenberger,* 885 F.2d 415 (8th Cir. 1988), *cert. denied,* 109 S.Ct. 2065 (1989). In that case, over 75% of commercial and industrial personal property was covered by an exemption which did not cover the rail cars at issue. The court found that this was discriminatory and in violation of § 11503(b). "Discrimination against a taxpayer protected by [§ 11503(b)(4)] cannot be justified because others are also victims of discrimination." *Id.* at 418.

The Seventh Circuit dealt with a case in which a tax was imposed on an activity which only railroads engaged in. *Burlington Northern Railroad Co. v. City of Superior, Wis.,* 932 F.2d 1185 (7th Cir. 1991). The court found that was prima facie discriminatory. They went on to raise the question of how a court should proceed if the activity taxed includes the railroad as the principal but not the sole actor. They concluded that "the inclusion of some nonrail activities in a class of activities dominated by railroads does not immunize a tax from challenge under [§ 11503(b)]." *Id.* at 1188. "The state is confined to taxing railroads as members of larger taxpayer groups-owners

of commercial or industrial property, recipients of gross income, recipients of net income, whatever." *Id.*

The Fifth Circuit has gone into even more detail about what types of larger groups might be appropriate for the taxing of railroads. *Kansas City Southern Ry. Co. v. McNamara*, 817 F. 2d 368 (5th Cir. 1987). This case involved a tax, known as the T&C tax, on the gross receipts of public utilities. The court found this tax discriminatory.

> The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden. The class of taxpayers subject to the T&C tax is simply too small and too foreign to fulfill this function[.]

Id. at 375.

This Court finds, based on the persuasive authority cited above that the tax on computer software that is at issue here is a tax on an isolated and targeted group and is therefore discriminatory pursuant to § 11503(b)(4). Only public utilities are excluded from the application of the exemption in C.R.S. § 39-3-117. Only public utilities have their property taxes centrally assessed.

It is therefore, ORDERED that the Defendants' Motion to Dismiss is DENIED. Plaintiff's Motion for Preliminary injunction is GRANTED. Defendants are permanently enjoined from assessing taxes on Plaintiff's computer software.

Any funds deposited into the Court registry by Plaintiff in accordance with this Court's May 16, 1995 order shall be returned to Plaintiff along with any accrued interest and minus the standard administrative fee.

DATED at Denver, Colorado, this 30th day of June, 1995.

BY THE COURT:

Daniel B. Sparr
United States District Judge

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. No. 94-3037

Burlington Northern Railroad Company,

Plaintiff,

-vs-

South Dakota Departmentof Revenue; Fall River County; and Edgemont School District 23-1,

Defendant.

MEMORANDUM OPINION
AND ORDER

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Burlington Northern Railroad ("BNRR") and Fall River County and Edgemont School District (collectively referred to as "County") have made Motions For Summary Judgment. The South Dakota Department of Revenue ("DOR") joined the Motion For Summary Judgment made by BNRR. The motions were heard on April 14, 1995 and taken under advisement.

BNRR brought this action for declaratory relief seeking a judgment declaring that the taxation of its personal property would violate 49 U.S.C. § 11503(b) which is also referred to as Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act").

I. Jurisdiction

Subject matter jurisdiction exists over this action pursuant to 49 U.S.C. § 11503(c).

II. Background

North Dakota and South Dakota in the early 1980s had statutes which levied an ad valorem tax on all personal property, but then exempted from such taxes all personal property except that which was centrally assessed by the state. Such a taxing scheme was held to violate the 4-R Act in *Ogilvie v. State Board of Equalization*, 492 F.Supp. 466 (D.N.D. 1980), aff'd, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981), and in this Court's decision in *Otter Tail Power Co. v. State of South Dakota*, No. 82-3044 (D.S.D. March 30, 1984).

South Dakota now exempts from ad valorem taxation all personal property not centrally assessed. SDCL § 10-4-6.1. Centrally assessed personal property is that owned by railroads (SDCL § 10-28-1), airlines (SDCL § 10-29-2), express companies, (SDCL § 10-32-1), telephone companies (SDCL § 10-33-10), telegraph companies (SDCL § 10-34-1), light, power, heating, water and gas companies (SDCL § 10-35-2), rural electric companies (SDCL § 10-36-1), and pipeline companies (SDCL § 10-37-1).

The United States Supreme Court held in *Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 144 S. Ct. 843, 848 (1994), that "a State may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4)".

III. Decision

There are no genuine issues of material fact in dispute in the instant case and therefore summary judgment is appropriate. *See* FRCP 56(e).

The issue in this case is whether the United States Supreme Court's decision in *ACF, supra,* changes the results reached in *Otter Tail, supra,* and *Ogilvie, supra.* Judge Steven Zinter found that it did not in Proposed Findings of Fact and Conclusions of Law dated June 12, 1995, in the state court action entitled *Fall River County v. State of South Dakota Department of Revenue, et al.,* No. 93-358, 93-352, Sixth Judicial Circuit Court, Hughes County, South Dakota. Judge Paul Benson, in *Ogilvie v. State Board of Equalization,* No. A3-80-134, (D.N.D. June 9, 1995), also held it did not.

South Dakota clearly does not have a generally applicable ad valorem personal property tax with exemptions, and therefore does not have the type of taxing system approved in *ACF, supra.* The only personal property taxes levied in South Dakota are those specifically set out in SDCL Chapters 10-28 through 10-37. These taxes target only the companies specifically described therein. There is no clearly identifiable common characteristic of the companies, other than the fact that their property is centrally assessed.

BNRR and the other companies centrally assessed by the DOR, as set out in SDCL Chapters 10-28 through 10-37, are an isolated and targeted group which the Supreme Court referred to in *ACF,* 114 S. Ct. at 851. These taxing statutes do not exempt the non-taxed property, but

single out only the designated industries for personal property taxation. South Dakota in SDCL 10-28 has "singled out railroad property for discriminatory treatment," *ACF*, 114 S. Ct. at 851, and this chapter still violates the 4-R Act in seeking to tax the personal property of railroads.

IV. Conclusion

The United States Supreme Court's decision in *ACF, supra*, does not validate South Dakota's statute for the taxation of railroads' personal property.

Therefore, upon the record herein,

IT IS ORDERED:

(1) That plaintiff's Motion For Summary Judgment, Doc. 13, and South Dakota Department of Revenue's Joinder in Plaintiff's Motion For Summary Judgment, Doc. 18, are granted.

(2) That Defendants' Fall River County and Edgemont School District 23-1 Motion For Summary Judgment, Doc. 26, is denied.

(3) That Plaintiff's Motion to Strike Affidavit of Richard Pluimer, Doc. 42, is denied.

(4) That the Clerk of Courts shall enter judgment declaring that the State of South Dakota cannot tax the personal property of plaintiff railroad, in that the portion of SDCL 10-28 which seeks to do so violates 49 U.S.C. § 11503.

Dated this 26th day of June, 1995.

BY THE COURT:

_____

Senior U.S. District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK

BY: _____
DEPUTY

(SEAL)

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

NO. 95-855

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

GERALD D. BAIR, Director,
Iowa Department of Revenue and Finance,

Petitioner,

v.

THE BURLINGTON NORTHERN
RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARKANSAS, FLORIDA, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether an ad valorem tax on residential, commercial and industrial real property, manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and all property of centrally assessed utilities and transportation companies is subject to challenge under 49 U.S.C. § 11503(b)(4), and if so, does such an ad valorem tax discriminate against rail carriers;

(2) Is a valuation challenge adjudicating the true market value of railroad property pursuant to 49 U.S.C. § 11503(b)(1) governed by the burden of proof that would apply in a state proceeding involving the same matter.

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I

INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of the petitioner, Iowa, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment of that court in this matter, *Burlington Northern R. Co. v. Bair*, 60 F.3d 410 (8th Cir. 1995). The amici States fall within the jurisdictional boundaries of several of the federal circuits. Because this brief is submitted on behalf of Washington, Arkansas, Florida, Kansas, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Utah, Vermont and Virginia by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issues presented here are: (1) whether an ad valorem tax on residential, commercial and industrial real property, manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and all property of centrally assessed utilities and transportation companies is subject to challenge under 49 U.S.C. § 11503(b)(4), and if so, does such an ad valorem tax discriminate against rail carriers; and (2) is a valuation challenge adjudicating the true market value of railroad property pursuant to 49 U.S.C. § 11503(b)(1) governed by the burden of proof that would apply in a state proceeding involving the same matter.

The amici States are fifteen States within whose borders railroads carry on extensive transportation operations. The railroad transportation operations within the amici

States represent a significant presence in terms of property and personnel and a concomitant obligation on the part of state and local governments to provide essential services.[1] Ad valorem property taxes are an important part of the revenue systems of these States.[2] Similar to Iowa, the amici States, by constitutional provisions or statutory enactments, have removed certain property from ad valorem taxation for a number of reasons, including encouraging economic development and administrative efficiencies.[3] Also, several amici States, by the enactment of statutes or by judicial decision, apply a heightened burden of proof to tax-

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[1]For 1994, railroad net investment in road and equipment nationwide was reported to exceed $54 billion. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 42 (1995 ed.) For Class I line-haul railroads operating railroad mileage of 35,178 miles and railroad employment of 60,088 persons were assignable to the amici States. *Id.*, at 45, 57. Class I railroads, while comprising two percent of the nation's railroads, in 1994 generated 90% of freight revenues and accounted for 89% of railroad employment and 73% of mileage operated. *Id.*, at 3.

[2]For the fiscal year ended June 30, 1992, property taxes constituted 75% of all tax revenues collected nationwide for the support of local (as opposed to state) governments and other taxing districts. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, GOVERNMENT FINANCES: 1991-92 (PRELIMINARY REPORT) (1994), at 1. Property tax collections in the amici States during the same period for both state and local governments approximated $55.1 billion. *Id.* Information taken from ICC compilations for 1993 indicate that Class I line-haul railroads paid property taxes in the amount of $326,035,000. OFFICE OF ECONOMICS, INTERSTATE COMMERCE COMM'N, TRANSPORT STATISTICS IN THE U.S.: RAILROAD COMPANIES AND MOTOR CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT, Part I, Table 5, at 12 (Dec. 31, 1993).

[3]This Court in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843, 852 (1994), discussed several such constitutional provisions and statutes: "La.Const., Art. VII, § 21(F) (10-year exemption for any 'new manufacturing establishment or . . . addition to an existing manufacturing establishment'); Ore.Rev.Stat. § 285.597 (1991) (exemption for business property in an 'enterprise zone'); Va.Code. Ann. § 58.1-3661 (1991) (permitting any county, city or town to exempt from its property tax 'solar energy equipment, facilities or devices' and 'recycling equipment, facilities, or devices')."

payers, including railroads, challenging ad valorem property tax valuations.[4] Three of the amici States, Arkansas, Nebraska and North Dakota, are within the Eighth Circuit and are affected immediately by the decision below.

If the Eighth Circuit's interpretation of the 4-R Act were allowed to stand and were to be adopted by other circuits, the ability of the states in that Circuit, as well as states in other circuit's adopting the Eighth Circuit's interpretation, to structure their ad valorem property tax systems in a manner that best promotes sound tax policy judgments without suffering undue revenue losses will be seriously impeded. Of further concern is the potential for application of Eighth Circuit's interpretation of 49 U.S.C. § 11503(b)(4) to other sources of revenue relied on by the states. Finally, contrary to the intent and purpose of the 4-R Act, if the Eighth Circuit's decision on the burden of proof issue is not overturned, railroads in the Eighth Circuit, and any other circuit following its lead, will be treated more favorably than other taxpayers.

II

SUMMARY OF ARGUMENT

1. Under the decision below, ad valorem property tax systems are subject to challenge under 49 U.S.C. § 11503(b)(4)--the "another tax" provision of the 4-R Act. Subsection (b)(4), however, plainly does not apply to property taxes, which instead are regulated by the specific restric-

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[4] *See, e.g.*, NEV. REV. STAT. §§ 361.227(5), 361.430 (requiring "clear and satisfactory evidence"); WASH. REV. CODE § 84.40.0301 (requiring "clear, cogent and convincing evidence"); *People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comm'rs*, 196 N.Y. 39, 53, 89 N.E. 581 (Ct. App. 1909) ("a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair market value of the property assessed").

tions in subsections (b)(1)-(3). This Court's analysis in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843 (1994), supports the view that subsection (b)(4) does not apply to property taxes.

2. The court below also erred in concluding that Iowa's ad valorem property tax system is not generally applicable. When Iowa's taxation of property is considered in its entirety, Iowa taxes a comparable percentage of property as is taxed in Wisconsin (an ad valorem property tax system the Seventh Circuit in *Burlington Northern R. Co. v. Wisconsin Dep't of Rev.*, 59 F.3d 55 (7th Cir. 1995), held was generally applicable).

3. The court below also erred in finding *ACF Industries* "inapposite" because no basis exists to distinguish between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax. 49 U.S.C. § 11503(a)(4) simply speaks of property that is taxed, not which methods state legislatures must use to exclude property from taxation. Moreover, the court below applied an ill-defined "test" to determine that Iowa's ad valorem property tax system was discriminatory. Because the purported test is ill-defined, the Eighth Circuit provided little or no guidance to the states in fashioning non-discriminatory ad valorem tax systems or other tax systems governed by subsection (b)(4).

5. The court below, in contrast to the Ninth Circuit in *Burlington Northern R. Co. v. Department of Rev., State of Washington*, 23 F.3d 239 (9th Cir. 1994), failed to follow the plain language of the 4-R Act by refusing to apply the burden of proof that would have been applied had the plaintiff railroad brought its valuation challenge in state court.

6. This case presents several important issues of federal law upon which lower courts are divided.

III

ARGUMENT

A. 49 U.S.C. § 11503(b)(4) Plainly Applies Only to Taxes Other Than Property Taxes.

The Eighth Circuit below, without analysis, assumed that 49 U.S.C. § 11503(b)(4)[5] applies to property taxes. This Court has never held that subsection (b)(4) applies to property taxes. Moreover, as shown below, the Eighth Circuit's assumption is contrary to the plain language of subsection (b)(4) and conflicts with the analysis in *Department of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. ___, 114 S. Ct. 843 (1994), the only case in which this Court has interpreted subsection (b)(4).

"[T]he language employed by Congress" is the starting point in all cases of statutory construction and this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Here, subsection (b)(4), which prohibits the imposition of "another tax that

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[5]49 U.S.C. § 11503 is the recodification of § 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, first codified at 49 U.S.C. § 26c (1976). The original Act was recodified in 1978. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The texts of both § 11503 and § 306 are provided in the Appendix. The language of the recodification differs slightly from the original language of § 306. However, such changes "may not be construed as making a substantive change in the laws replaced." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Therefore, § 11503(b)(4) should be interpreted in light of the language of § 306(1)(d), and the two versions of the statute should be harmonized to the extent possible, with any unavoidable conflicts resolved in favor of the original language. *See, e.g., Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 523-24 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

discriminates against a rail carrier,"[6] follows in sequence subsections (b)(1)-(3), which prescribe discriminatory property taxes.[7] As used in subsection (b)(4), "another tax" is limited to a tax different or distinct from the ad valorem property tax restricted by the prohibitions of subsections (b)(1)-(3).

In the context of § 11503(b), the word "another" means "different or distinct from the one first named or considered[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (1971).[8] In subsection (b)(4), Congress intended to prohibit discriminatory taxes different or distinct from the property tax it had already addressed in subsections (b)(1)-(3). This plain reading of § 11503(b) comports with this Court's holding in *ACF Industries*.

In *ACF Industries*, Oregon argued that "[b]ecause subsections (b)(1)-(3) address property taxes and only property taxes, it follows that the term 'another tax' in subsection (b)(4) must mean 'a tax different from a property tax'" and that "subsection (b)(4) does not speak to discriminatory property tax exemptions for the simple reason that the provision does not speak to property taxes at all." 114 S. Ct. at 848.[9] The plaintiff Carlines, in contrast, argued that "the phrase 'another tax that discriminates against a rail carri-

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[6]Section 306(1)(d), the provision corresponding to § 11503(b)(4), prohibited "[t]he imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad" (emphasis added).

[7]Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.

[8]Similarly, in the context of § 306(1)(d), "other" means "different or distinct." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1971) defines "other" as "not being the one (as of two or more) first mentioned or of primary concern : . . . being the ones distinct from the one or those first mentioned or understood . . . not the same : DIFFERENT . . ."

[9]Unlike subsections (b)(1)-(3), subsection (b)(4) does not refer to "rail transportation property," but instead speaks of "disciminat[ion] against a rail carrier . . ."

er' [is] a residual category designed to reach any discriminatory state tax, including discriminatory property taxes, not covered by subsections (b)(1)-(3)." 114 S. Ct. at 848. According to the Carlines, "[i]f Congress had intended to exclude property taxes from the reach of (b)(4), . . . it would have drafted the provision to prohibit 'any tax other than a property tax,' and not phrased the statute as it did." 114 S. Ct. at 848. Finding either interpretation plausible in isolation, this Court nevertheless rejected the Carlines' reading of subsection (b)(4), concluding that "[t]he structure of § 11503 as a whole does yield an answer, one adverse to the Carlines' challenge to Oregon's property tax." 114 S. Ct. at 848.

In rejecting the Carlines' argument that subsection (b)(4) is "designed to reached any discriminatory state tax, including discriminatory property taxes," this Court first considered subsections (b)(1)-(3) and the definition of "commercial and industrial property" in § 11503(a)(4) and the interplay between these subsections. This Court concluded that subsection (b)(4) should not be read to prohibit that which subsections (b)(1)-(3), in conjunction with subsection (a)(4), allow. *See* 114 S. Ct. at 848.

This Court next discussed the meaning of the phrase "subject to a property tax levy," deciding that these words "must mean 'taxed property,'" rather than taxable property within the State's jurisdiction and power to tax. Thus, this Court concluded that railroads may not challenge property tax exemptions under subsections (b)(1)-(3) and that these subsections only prohibit discrimination between railroad property and taxed commercial and industrial property. *See* 114 S. Ct. at 849. This Court reasoned that "[i]t would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)." 114 S. Ct. at 849. Thus, this Court held that the Carlines' reading of subsection (b)(4)--that the phrase "another tax that discriminates against a rail carrier" is designed to reach any discriminatory state tax, includ-

ing discriminatory property taxes--was "*untenable in light of § 11503 as a whole.*" 114 S. Ct. at 849 (emphasis added).

The Eighth Circuit below, contrary to *ACF Industries*, simply assumed that property tax challenges may be brought under subsection (b)(4). To make matters worse, in applying subsection (b)(4) the Eighth Circuit did not consider Iowa's actual ad valorem property tax system, but instead concocted a hypothetical tax different from the ad valorem property tax imposed by Iowa: "Iowa's scheme does not even impose a generally applicable tax on *personal* property." 60 F.3d at 413 (emphasis added). The Eighth Circuit's conclusion slighted the import of subsection (b)(4), prohibiting the imposition of "another *tax* that discriminates against a rail carrier" (emphasis added). This provision does not speak of "another component" or "another aspect" of a tax. Rather, the statutory language contemplates consideration of another tax as a whole. That is the approach to subsection (b)(4) taken in *ACF Industries*, shown by this Court's repeated references to "Oregon's ad valorem tax" and "Oregon's ad valorem property tax." *See, e.g.*, 114 S. Ct. at 846, 847, 848, 851-52. Never once did this Court consider Oregon's taxation of personal property apart from Oregon's taxation of real property.

Moreover, the Eighth Circuit's conclusion that Iowa's property tax is not generally applicable is erroneous. The test for "general applicability" used by the Seventh Circuit in *Burlington Northern R. Co. v. Wisconsin Dep't of Rev.*, 59 F.3d 55 (7th Cir. 1995), demonstrates that Iowa's ad valorem property tax is generally applicable. The test employed by the Seventh Circuit looked at the "percentage of the total tax levy that falls on railroads." 59 F.3d at 58 (footnote omitted). As shown in Iowa's Petition for Writ of Certiorari, railroads pay a small portion of the commercial and industrial ad valorem property tax in Iowa (less than 5 percent)

and an even smaller portion of the entire ad valorem property tax in Iowa (less than 1 percent).[10] These numbers are comparable to those for railroads in the State of Wisconsin. *See* 59 F.3d at 58. Because Iowa's ad valorem property tax is generally applicable, the Eighth Circuit erred in permitting the plaintiff railroad's challenge to Iowa's ad valorem property tax under subsection (b)(4), contrary to the plain language of subsecton (b)(4) and this Court's instruction in *ACF Industries*.

B. The Eighth Circuit's Conclusion That *ACF Industries* is "Inapposite" is Insupportable and Its Purported Test to Determine What is a Discriminatory Tax is Ill-Defined.

Even if property tax challenges were permitted under subsection (b)(4)--which they are not--the Eighth Circuit erred in finding Iowa's tax on railroad personal property discriminatory. The Eighth Circuit inexplicably limited this Court's reasoning in *ACF Industries* to exemptions, labeling as "specious" Iowa's "argu[ment] that a failure to tax non-railroad personal property is the equivalent of granting an exemption[.]" 60 F.3d at 412-13. However, it is the Eighth Circuit's distinction between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax

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[10]The calculations are derived as follows:

$$\frac{\text{\$541 million (assessed value of railroads)}}{\text{\$13 billion (assessed value of commercial and industrial property)}} = .0416$$

$$\frac{\text{\$541 million (assessed value of railroads)}}{\text{\$70 billion (assessed value of all taxable Iowa property)}} = .0077$$

See Pet. for Writ of Cert., at 6.

that is insupportable. This is demonstrated by the operative statutory language construed in *ACF Industries*.

In concluding that exemptions are not "discriminatory" under subsections (b)(1)-(3) and (b)(4), this Court in *ACF Industries* relied, in part, on the definition of "commercial and industrial property" in 49 U.S.C. § 11503(a)(4). This Court initially stated:

> "Commercial and industrial property," which serves as the comparison class for measuring discrimination under [subsections (b)(1)-(3)], is defined as "property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy" § 11503(a)(4).
>
> The interplay between subsections (b)(1)-(3) and the definition of "commercial and industrial property" in subsection (a)(4) is central to the interpretation of subsection (b)(4).

114 S. Ct. at 848. This Court then concluded that the phrase "subject to a property tax levy" means property that is *taxed*:

> Because property "subject to a property tax levy" means property that is taxed, the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which *discrimination* is measured under subsections (b)(1)-(3), and it follows that railroads may not challenge property tax exemptions under those provisions.
>
> . . . [W]e must pay heed to the fact that Congress placed exempt property beyond the reach of subsections (b)(1)-(3). *It would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4).*

114 S. Ct. at 849 (emphasis added).

As the operative statutory language, "subject to a property tax levy," focuses on "property that is taxed," the 4-R

Act simply does not distinguish between ad valorem systems that exempt certain property from the tax and those that instead define certain property so as to remove it from the tax. Thus, the Eighth Circuit improperly elevated form over substance and erroneously held *ACF Industries* "inapposite." 60 F.3d at 413.[11]

The question of what constitutes "discrimination" under subsection (b)(4) has caused confusion in the lower courts, even after this Court's decision in *ACF Industries*.[12] The source of the confusion is that in contrast to the carefully drawn tests for discrimination in subsections (b)(1)-(3), no test is contained in subsection (b)(4). The subsection merely prohibits as "discriminatory" another tax that "discriminates" against rail carriers. Thus, to ascertain the meaning of "discriminates" in subsection (b)(4), one must examine § 11503 in its entirety or, more precisely, the tests for "discrimination" embodied in subsections (b)(1)-(3).

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[11]Indeed, Iowa's decision not to subject certain personal property to its ad valorem property tax simply results in that personal property being "exempt" from the tax, similar to the ad valorem tax systems in Oregon and Wisconsin.

[12]*Compare Union Carbide Corp. v. Board of Tax Comm'rs of the State of Indiana*, 69 F.3d 1356, 1359 (7th Cir. 1995) (dismissing subsection (b)(4) claim because "[t]hat Indiana uses the money it raises for a special purpose (subsidizing passenger rail transportation) rather than putting the revenues in its general fund does not turn an ad valorem tax into 'another' tax") *with Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995), *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995) (prohibiting under subsection (b)(4) the assessment of railroad computer software because the statutory exemption for computer software is available only to certain non-railroad taxpayers); *Ogilvie v. State Bd. of Equalization, State of N. Dakota*, 893 F. Supp. 882 (D. N.D. 1995) (prohibiting under subsection (b)(4) the assessment of railroad personal property); *Burlington Northern R. Co. v. South Dakota Dep't of Rev.*, No. 94-3073 (D. S.D. June 26, 1995) (prohibiting same).

That was the approach used by this Court in *ACF Industries*.[13]

In contrast, to determine whether Iowa had discriminated against the plaintiff railroad, the Eighth Circuit concocted a hypothetical tax by artificially limiting its analysis to Iowa's taxation of personal property. The Eighth Circuit simply ignored significant taxable property in Iowa (*e.g.*, all real property) while considering other property not subject to taxation (*e.g.*, personal property not subject to a property tax levy).[14]

The Eighth Circuit's purported "test" for discrimination is not tied in any way to § 11503. Rather, it is contrary

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[13]In *ACF Industries*, this Court contemplated that a tax imposed upon railroads alone or as part of an isolated and targeted group *might* result in "exemption discrimination" under subsection (b)(4). This Court stated:

> To begin with, this is not a case in which the railroads--either alone or as part of some isolated and targeted group--are the only commercial entities subject to an ad valorem property tax. Cf. *Burlington Northern R. Co. v. City of Superior*, 932 F.2d 1185 (CA7 1991) (occupation tax on owners and operators of "iron ore concentrates docks," in practical effect, applied only to docks owned by one particular rail carrier). If such a case were to arise, it might be incorrect to say that the State "exempted" the nontaxed property. Rather, one could say that the State had singled out railroad property for discriminatory treatment. See J. Hellerstein & W. Hellerstein, State and Local Taxation 973 (5th ed 1988)(the term "exemption" does not mean every exclusion from the reach of a levy, but rather exclusions of "property, persons, transactions . . . which are logically within the tax base"). On the record before us, Oregon's ad valorem property tax does not single out rail-road property in that manner, and we need not decide whether subsection (b)(4) would prohibit a tax of that nature.

114 S. Ct. at 851-52.

[14]In addition, the Eighth Circuit's statement that Iowa "leav[es] untaxed most of the personal property of every kind," 60 F.3d 413, strongly indicates that the court failed to consider that significant personal property in Iowa is taxed, including manufacturing machinery and equipment, computer equipment, motor vehicles, communications towers, and the personal property of other centrally assessed utilities and transportation companies.

to the definition of "commercial and industrial property" in subsection (a)(4) which solely addresses property that is taxed, not which method state legislatures must use to exclude property from taxation. Finally, the court's approach--concocting a hypothetical tax--provides no articulable "test" that can be applied in subsequent cases. As such, the Eighth Circuit's approach is ill-defined.[15]

C. The Impact of the Eighth Circuit's Flawed Approach Extends Beyond Property Taxes.

If the Eighth Circuit's approach to subsection (b)(4) is adopted, its impact will extend well beyond the disruption of state property tax systems. This is because "another tax" in subsection (b)(4) has been applied to all types of non-property taxes. *E.g.*, *Richmond, F. & P. R. Co. v. Department of Tax'n*, 762 F.2d 375 (4th Cir. 1985) (applying subsection (b)(4) to corporate net income tax); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987) (applying subsection (b)(4) to transportation and communication utilities tax); *Burlington Northern R. Co. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991) (applying subsection (b)(4) to occupational tax); *Alabama Great Southern R. Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (applying subsection (b)(4) to franchise tax); *Atchison, Topeka & Santa Fe*

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[15]The district court in *Burlington Northern R. Co. v. Huddleston*, Civ. No. 95-8-472 (D. Colo. June 30, 1995), *appeal docketed*, No. 95-1316 (10th Cir. July 31, 1995), took the Eighth Circuit's flawed approach even further. In that case, the plaintiff railroad claimed that the assessment of its computer software, which is exempt when held by certain other taxpayers, violated subsection (b)(4). The district court, in addressing whether the ad valorem property tax before it was not generally applicable (and, therefore, discriminatory) did not consider the property tax applied in Colorado. The district court instead, similar to the Eighth Circuit, concocted a hypothetical tax imposed *solely* on computer software. This tax, the district court found, "is a tax on an isolated and targeted group and is therefore discriminatory pursuant to § 11503(b)(4)." (Pet. for Writ of Cert., app. M, at 130a).

Ry. Co. v. Bair, 338 N.W.2d 338 (Iowa 1983) (applying subsection (b)(4) to special excise tax on consumed fuel), *cert denied*, 456 U.S. 1071 (1984).

The Eighth Circuit's ill-defined "test" easily could be used to find any number of exclusions from a tax base discriminatory, because it inappropriately restricts the comparison class for discrimination.[16] For example, assume that a state, to encourage manufacturers to move to the state, enacts a sales tax exemption for new construction for manufacturers. Since a railroad is not a manufacturer it is not entitled to the exemption, even if it were to construct a new maintenance shop. If the determination of the general applicability of the sales tax is artificially restricted to railroads and manufacturers or the taxation of new construction, the tax would be considered to be a tax on an isolated and targeted group and, therefore, discriminatory pursuant to subsection (b)(4). However, if the entire sales tax is considered, the appropriate conclusion would be that the tax is generally applicable and the exemption at issue would not be discriminatory under subsection (b)(4).

In sum, the flawed approach of the Eighth Circuit, if upheld, will impact more than ad valorem property taxes and, therefore, is of great concern to the states.

D. The Potential Fiscal Impact of the Eighth Circuit's Decision Upon the States is Substantial.

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[16] *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. State of Arizona*, No. 94-15850 (9th Cir., argued October 19, 1995) *on appeal from* CIV 93-549-PHX-RGS (D. Ariz. March 7, 1994) (see Pet. for Writ of Cert., app. L, at 115a-22a). In Arizona, the transaction privilege tax is imposed on entities engaging in business activities within 18 classifications, including 15 entities within the transportation classification. The plaintiff railroad's competitors (motor carriers) are subjected to a different tax scheme. Limiting the comparison class solely to the railroad's competitors, the district court held that the exemption available to motor carriers from the transaction privilege tax resulted in discrimination against railroads in violation of subsection (b)(4).

The Eighth Circuit immunized Burlington Northern from any taxes upon personal property it holds. In effect, the Eighth Circuit held that Congress intended to absolve railroads from the obligation to pay a significant portion of a tax of general applicability that traditionally has been used to fund the essential costs of state and local governments. Nationwide, recent railroad net investment has been estimated to exceed $38.4 billion, with operating revenues calculated at $27.5 billion.[17] Trackage within the country approximates 183,685 miles.[18]

A fairly recent railroad industry submission to this Court indicates that taxes paid upon such values by Class I railroads approach $281 million.[19] The potential consequences from the decision below for Eighth Circuit States are consistent with these nationwide totals. In addition to the possible property tax loss in Iowa, other affected Eighth Circuit States have at risk considerable amounts in property tax revenues. If the rationale of *Bair* were extended nationwide to immunize railroads from state and local income, sales and other taxes, the additional potential loss could be estimated conservatively at $70 million.[20]

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[17]INTERSTATE COMMERCE COMMISSION, 1993 ANNUAL REPORT, at 115. Totals shown are for Class I line-haul railroads. Under carrier classifications adopted by the ICC, Class I railroads are carriers with annual operating revenues in excess of an amount that is annually adjusted for inflation. In 1994, the revenue threshold was $255.9 million. Class I railroad systems represent less than three percent of railroads in the country but account for 90% of freight revenue. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 3 (1995 ed.)

[18]*Id.*, at 44.

[19]See Br. Amicus Curiae of Association of American Railroads at 14, *Chesapeake W. Ry. v. Tax Comm'r* (No. 91-1198).

[20]ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS, at 16 (1995 ed.) Aggregate taxes paid by railroads in 1994 to state and local governments and to the federal government (other than for federal payroll and income taxes) exceeded $710 million.

E. The Eighth Circuit Failed to Follow the Clear Language of the 4-R Act Dictating the Application of Iowa's Burden of Proof, Contrary to the Policy Behind the Statute.

49 U.S.C. § 11503(c) provides: "The burden of proof in determining assessed value and true market value is governed by State law." The Ninth Circuit found this statutory language unequivocal in *Burlington Northern R. Co. v. Department of Rev., State of Washington*, 23 F.3d 239, 241 (9th Cir. 1994):

> "The burden of proof in determining assessed value and true market value is governed by state law." 49 U.S.C. § 11503(c). Under Washington law, the determination of the value of the property by public officials is presumed correct. RCW 84.40.0301(1). The presumption may be defeated only by evidence that is "clear, cogent and convincing." Id. The district court correctly applied this standard.

In contrast, the Eighth and Tenth Circuits have refused to follow particular state statutes applying to ad valorem property tax valuation challenges in favor of a general civil preponderance of the evidence standard. *See Bair*, 60 F.3d at 414; *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1500 n.4 (10th Cir. 1984). The Eighth Circuit's and Tenth Circuit's refusals to pay heed to the plain words of 49 U.S.C. § 11503(c) impacts the states in these jurisdictions and, if the reasoning of these circuits were adopted by other circuits, the applicable burden of proof in a number of other amici States also would be nullified.

The Eighth Circuit's and Tenth Circuit's misinterpretations of subsection (c) also is contrary to the policy of nondiscriminatory treatment reflected in the 4-R Act. Subsections (b)(1) and (b)(3) simply require that the assessment ratios and tax rates applied to railroad property not exceed those applied to commercial and industrial property and "subsection (b)(4) merely protects railroads from discrimi-

nation, rather than conferring on them a right to be treated like the most favorably treated taxpayer[.]" *ACF Industries*, 114 S. Ct. at 181 (Stevens, J., dissenting). *See also CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 801 F. Supp. 28, 35-36 (M.D. Tenn. 1992) ("Plaintiff wants this Court to mandate preferential treatment favoring it over similarly situated taxpayers, including other commercial and industrial taxpayers. The Federal Congress in enacting the 4-R Act did not intend such a result.") Thus, the Eighth Circuit, like the Tenth Circuit, erred in elevating railroads to a favorable status compared to other taxpayers, who are subject to the higher standard when challenging their ad valorem property tax valuations. This result is contrary to the 4-R Act's sound policy of equal and non-discriminatory treatment.

IV

CONCLUSION

This case presents several important issues of federal law upon which lower courts are divided. Therefore, this Court should grant Iowa's Petition for Writ of Certiorari.

DATED this 29th day of December, 1995.

Respectfully submitted,

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APPENDIX

49 U.S.C. § 11503

Tax discrimination against rail transportation property

(a) In this section--

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds

the tax ratio rate applicable to taxable property in the taxing district.

49 U.S.C. § 306

Prohibiting discriminatory tax treatment of transportation property

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that--

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed."

Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

No. 95-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GERALD D. BAIR, DIRECTOR,
IOWA DEPARTMENT OF REVENUE AND FINANCE,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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Counsel of Record for Respondent

QUESTIONS PRESENTED

Respondent restates the Questions Presented as follows:

I. Whether the unanimous federal case authority has correctly decided that statutory schemes that single out rail transportation property and a few other disadvantaged taxpayers for personal property tax when other commercial and industrial personal property is not taxed violate Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976.

II. Whether the refusal of lower courts to impose a discriminatory burden of proof as the "applicable State law" is correct.

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is the Director of the Department of Revenue and Finance of the State of Iowa (hereinafter referred to as the "Director" or "Petitioner").

The Respondent is The Burlington Northern Railroad Company (hereinafter referred to as "BN"), a wholly-owned subsidiary of Burlington Northern Inc., which in turn is wholly owned by the Burlington Northern Santa Fe Corporation.

The majority-owned subsidiaries of respondent Burlington Northern Railroad Company are:

Burlington Northern Dock Corporation
Burlington Northern (Manitoba) Limited
Burlington Northern Railroad Holdings, Inc.
Burlington Northern Worldwide, Inc.
Electro Northern, Inc.
Western Fruit Express Company
Winona Bridge Railway Company

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IN THE

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OCTOBER TERM, 1995

GERALD D. BAIR, DIRECTOR,
IOWA DEPARTMENT OF REVENUE AND FINANCE,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

The statutory provisions involved are adequately stated in the Petition and Appendices I and J thereto.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Petitioner's Statement of the Case, Burlington Northern Railroad Company (BN) hereby offers a counterstatement of the case.

The Petition omits any statement of the proceedings and issues decided below, and significantly misstates the facts concerning Iowa's property tax scheme in an attempt to reshape this case into conflict with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994) (hereinafter referred to as "*ACF*").

In the district court, BN raised four claims that its 1989 Iowa assessment violated Section 306.[1] First, the Petitioner discriminated against BN in violation of Section 306(1)(a) by significantly overstating the value of BN's rail transportation property. Second, the Petitioner discriminated against BN in violation of Section 306(1)(a) by failing to equalize BN's assessment to the level of all other commercial and industrial real property in Iowa. Third, the Petitioner discriminated against BN in violation

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[1] Section 306 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub.L.No. 94-210, 90 Stat. 31, 54-55 (Feb. 5, 1976), codified at 49 U.S.C. § 11503. The language of Section 306 appears in Appendix I to the Petition. As did the Petition, this response shall reference the language of Section 306. *See* Pet., p.2.

of Section 306(1)(d) by taxing BN's intangible property although Iowa does not tax the intangible properties of any locally assessed[2] commercial and industrial taxpayers. Fourth, although the Petitioner had allowed BN a deduction for its tangible personal property, he discriminated against BN in violation of Section 306(1)(d) by treating certain of BN's personal property as real property in his calculation of BN's tangible personal property deduction.

Preliminary injunctive relief was entered by the district court, initially by consent, and later by ruling after a hearing. The issues on the merits were framed by a detailed pre-trial order, and the case was submitted to the district court upon an extensive record over 11 days of trial.

The district court found that the Petitioner had discriminated against BN by overvaluing its property and by including certain intangible property in BN's assessment. The district court denied all relief on BN's second and fourth claims. BN did not appeal the district court's denial of its second and fourth claims. The Petitioner appealed the district court's rulings on valuation and intangible property.

The case below was tried prior to *ACF*, and the trial did not address the theories now advanced by the Petition. The pre-trial order did not set forth the factual

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[2] Railroad property, unlike most property in Iowa, is "centrally assessed" by the Petitioner. Only a small number of utilities and railroads are centrally assessed by the Petitioner. All other property which is subject to ad valorem tax in Iowa is "locally assessed" by city and county assessors.

analysis now tendered by the Petitioner. Therefore, no fully-developed factual record exists in this case to support the type of analysis advanced by the Petition. Accordingly, the Respondent at the outset advises the Court, pursuant to Rule 15.2 of the Rules of the Supreme Court, that many of the "facts" stated in the Petition are either dehors the record or are unresolved factual disputes, and that the following points of "fact" and law would not be properly before the Court if certiorari were granted:

1. Contrary to the Petition's suggestions to the contrary (Pet., p.11), neither the district court nor the Eighth Circuit held in this case that Iowa could not assess BN's tangible personal property. Because the Director did not purport to tax BN's tangible personal property for the tax year at issue here, the lower courts were not required to make any rulings on the question whether BN's tangible personal property could be taxed. The lower courts' rulings were therefore limited to intangible personal property. To the extent that the Petitioner seeks review of issues of the taxation of BN's tangible personal property, the Petition improperly seeks review by certiorari of an issue never decided below.

2. The assertion in the Petition that non-railroad taxpayers who are taxed on personal property "are both more numerous than the railroads and pay significantly more in taxes than the railroads" (Pet., p.5) was not a factual

finding in the district court and was not an issue tried below.

3. The conclusion that Iowa taxes "the same proportions of real and personal property as Oregon" (Pet., p.5) was not a factual finding in the district court and is not readily discernible from this record.

4. The Petition's assertions concerning total assessed values of categories of property in Iowa (Pet., p.6) were not argued by the parties below nor analyzed by the district court, and were raised for the first time when the Petitioner sought a rehearing before the Eighth Circuit.[3]

5. As is apparent from the Petition's desperate request for the Court "to notice" certain "facts" concerning unit assessments of railroads (Pet., p.6), the record below does not support the contention that current railroad assessments do not differ from the value that railroads would have been assessed in 1989 if all of their property had been included in their 1989 assessments. (Pet., p.7).

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[3] Although the Petition's asserted statistical analysis purports to rely on a trial exhibit, this exhibit was not used at trial for the purposes now attempted by the Petition.

6. The Petition's conclusions concerning the proportion of taxes paid by railroads (Pet., p.7) are not based on any findings or analysis of either of the lower courts.

7. The Petition's assertion that "only" $2.7 billion in market value of personal property was removed from the rolls as of January 1, 1986 with the repeal of personal property taxes in Iowa (Pet., pp.7-8) is incorrect and misleading. The aggregate assessed value of tangible personal property was frozen as of January 1, 1973. *See* Section 427A.11, Iowa Code (1989).[4]

8. The Petition's conclusions concerning the application of an alleged "Seventh Circuit test" to the Iowa tax scheme (Pet., p.9) is purely speculative based on the record in this case. No such test was proffered or considered either by the district court or the original panel of the Eighth Circuit.

In short, this case does not provide this Court with a developed factual record to properly conduct the analysis urged by the Petition. Furthermore, what the record does reveal is considerably at odds with the descriptions in the Petition.

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[4] All references are the 1989 Iowa Code unless otherwise stated.

The Petition describes Iowa's property tax system as "highly integrated" -- a description the Petition fails to define. According to the Petition, Iowa supposedly imposes a "unified tax" on a "single taxable class of property." (Pet., p.5.) The Petition continues its sophistry by stating that this single class of property contains both real and personal property. This description completely overlooks the total picture of the Iowa property tax system. The Petition's tortuous characterization of Iowa's law was rejected by the Eighth Circuit and is rebutted by the clear language of the statutes of Iowa, as well as the substantial record below.

Iowa imposes a property tax only on "real property" as defined in Section 427A.1, Iowa Code. Taxes on tangible personal property were repealed as of 1986 after a period of phase-out. *See* Acts of the 71st Iowa General Assembly, 1985 Session, Ch. 32, § 105. As the district court found, intangibles are likewise not generally subject to tax. *See* App., pp. 48a-49a.[5] Thus, Iowa does not generally tax personal property.[6]

This general statement must, however, be qualified because "real property" as peculiarly defined by Iowa statute includes not only land, buildings, and fixtures as defined in Section 427A.1, Iowa Code, but also two kinds of tangible personal property - computers and manufacturing machinery and equipment. These categories are arbitrarily defined to be "real property" for

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[5] References are to the Appendix to the Petition.

[6] Owners of motor vehicles pay an ad valorem tax at the time of registration of the vehicle. BN pays this tax in the same way as all other vehicle owners in Iowa.

purposes of taxation. These limited classes of tangible personal properties are not, however, fully taxed. Unlike actual real property, which is required to be assessed at 100% of market value, the assessment of computers and manufacturing machinery and equipment is limited to 30% of net acquisition cost. Therefore, such categories of property are not assessed at full market value as is generally required for railroads and for Iowa's real property. *Compare* Section 425B.17 *with* Section 441.21, Iowa Code.[7]

In contrast to the general non-taxation of personal property, Section 427A.1(1)(h), Iowa Code, classifies all of the property of centrally assessed taxpayers, including railroads, as "real property." *See* footnote 2, *supra.*

The effect of the statutes is that railroads are singled out by statute as a part of a small group of taxpayers to pay tax on all of their tangible and intangible personal property in Iowa.

The Petition attempts to obfuscate the obvious fact of discrimination against BN by referring to obscure and obsolete portions of the Iowa statutes, such as provisions concerning "ferry franchises," lessee's interest in state lands, and "rights to space above land." The record below does not discuss these types of properties at all, and does

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[7] In addition, Iowa has scheduled a "phase-out" of the property tax on computers and industrial machinery and equipment, prompted by legislation excluding such property from tax if first assessed on or after January 1, 1995. *See* Acts of the 76th Iowa General Assembly, 1995 Session, Ch. 206, § 29; Rule 80.7, 701 Iowa Administrative Code, Iowa Dept. of Revenue and Finance, adopted Oct. 20, 1995, Vol. XVIII, No. 10, Iowa Administrative Bulletin 789-790.

not specifically show whether there are "ferry franchises" actually taxed in Iowa.[8]

The Director makes much of Iowa's continued partial taxation of motor vehicles, computers, and manufacturing machinery, but he ignores the fact that BN's Section 306 relief accommodates such taxation. Equality is maintained because Burlington Northern is taxed on its motor vehicles just like locally assessed owners. *See* footnote No. 6, supra. No personal property deduction is allowed for BN's computers.[9] Burlington Northern does not happen to own manufacturing machinery, so that category does not impact BN.

Therefore, despite the Petition's creative efforts to recast the Iowa real property tax into something it is not, the fact remains that no commercial and industrial intangible personal property is taxed except the intangible personal property of railroads and a few other utility taxpayers. Furthermore, BN continues to pay tax on the limited types of personal property (such as motor vehicles and computers) which it owns and which are still subject to tax in Iowa.

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[8] There is, of course, a specific finding that intangibles were not taxed in Iowa. *See* App., pp. 48a-49a.

[9] As part of the Director's assessment of BN for 1989, he deducted the value of BN's tangible personal property by allocating the total assessed value between real and tangible personal property on the basis of the ratio of the net book value. BN's computers were treated as "real property" in this ratio, and thus the value of BN's computers was not deducted from its assessment.

REASONS FOR DENYING THE WRIT

The Petition does not present sufficient grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. BN respectfully submits that the Petition should be denied for the following reasons.

I. NO GROUNDS EXIST TO REVIEW THE EIGHTH CIRCUIT'S RULING CONCERNING THE DISCRIMINATORY TAXATION OF BN'S INTANGIBLE PERSONAL PROPERTY.

A. There is No Conflict in the Circuits.

The Petition incorrectly asserts that a conflict exists between the decision below and this Court's decision in *ACF* and the Seventh Circuit's decision in *Burlington Northern Railroad Company v. Wisconsin Department of Revenue*, 59 F.3d 55 (7th Cir. 1995).

There is no conflict because the property tax systems in Oregon and Wisconsin are quite different from that in Iowa. Stated simply, the results in the cases are different because the facts are different.

In *ACF* the Supreme Court considered a generally applicable personal property tax with specific exemptions carved out. The Seventh Circuit considered Wisconsin's tax system, and despite the railroads' claim to the contrary, found it to be indistinguishable from Oregon's.

The Eighth Circuit, in view of Iowa's general repeal of personal property taxes and the district court's specific

finding that intangible assets were not taxed, distinguished Iowa's tax scheme from Oregon's. It stated:

> We conclude that Iowa's tax scheme fits within the narrow exception left open by the Supreme Court in *ACF*. Here, we believe Iowa has singled out for taxation all the personal property of railroads and a handful of interstate utilities, while leaving untaxed most of the personal property of every kind, and all the intangible personal property, of the vast majority of commercial and industrial enterprises in the state. The Supreme Court refrained specifically, in *ACF*, from deciding whether [Section 306(1)(d)] would apply in such a case.

(Pet., p.8a.)

There is nothing in this rationale that conflicts with *ACF* or the Seventh Circuit's decision. Indeed, all of these cases apply the same principles. The differences in results emerge from differences in the tax systems considered.

In order to construct a perceived conflict, the Petition necessarily fails to discuss the rationale first enunciated by the Eighth Circuit -- and left undisturbed by this Court's ruling in *ACF* -- in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981) and *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985) ("Bair I").

In *Ogilvie*, the Eighth Circuit affirmed an injunction prohibiting the taxation of railroad personal property in

North Dakota because non-utility commercial and industrial taxpayers did not pay tax on personal property. The Eighth Circuit established the common-sense principle that the "most obvious form" of discrimination was to tax a class of railroad property which was not taxed to other commercial and industrial taxpayers. *See* 657 F.2d at 210.

In *Bair I*, the Eighth Circuit ruled that BN's personal property was entitled to the same "roll-back" of personal property valuation and application of credits against value as was then afforded to locally assessed taxpayers in Iowa as part of the phase-out of personal property taxes which was in progress at that time. Iowa's special statutory treatment of railroad personal property as "real property" was held not to preclude treating railroad personal property like other personal property. *Bair I* thus established that Iowa could not discriminate by classifying railroad property for separate adverse treatment and that railroad property should be treated like locally assessed personal property. When Iowa subsequently completed the phase-out and enacted a repealer of its tangible personal property tax, the Petitioner followed the direction of *Bair I* and ceased taxing railroad tangible personal property altogether.

The equality of treatment mandated by *Ogilvie* and *Bair* has simply been carried forward in this case by exclusion of BN's intangible assets from tax in view of the fact, proven at trial, that intangible assets are not taxed in Iowa.

The Petition indulges in a purported statistical analysis -- not presented to the district court or the original panel of the Eighth Circuit -- comparing railroad

assessments and taxes to aggregate assessments and taxes of other types of property. The Petition's statistical analysis is a transparent attempt to construct a conflict between the Eighth Circuit and the Seventh Circuit's decision in *Burlington Northern Railroad Company v. Wisconsin Department of Revenue, supra*. Because of the very different facts considered by the Seventh Circuit, the effort by the Petitioner to create the conflict fails at the threshold.

Wisconsin, unlike Iowa, but like Oregon, imposes a tax on all property, including personal property, but exempts specifically enumerated kinds of personal property. The Seventh Circuit cited statistics comparing railroad taxes to all other taxes solely to help resolve whether the actual tax levy was "a general tax in name only." *See* 59 F.3d at 58. No such inquiry is necessary here because there can be no claim that Iowa imposes a general personal property tax on tangibles or intangibles. In fact, the Seventh Circuit itself specifically distinguished *Ogilvie* -- and by necessary implication, *Bair I* and this case -- by comparing Wisconsin's "universal" tax to a tax which singles out centrally assessed taxpayers. *See* 59 F.3d at 55, n.1. Thus, the Seventh Circuit acknowledged the distinction drawn by the Eighth Circuit here that *ACF* does not spare discriminatory property taxation where railroads are targeted for a tax not generally applicable to other taxpayers.

It is certainly not clear that the analysis employed by the Seventh Circuit was compelled by this Court's decision in *ACF*, or is even an appropriate analysis to use in states like Wisconsin. For purposes of deciding whether certiorari is appropriate in this case, however, it is enough to say that the Eighth Circuit and the Seventh

Circuit are not in conflict, and nothing the Seventh Circuit said in its decision constructs a conflict between the Eighth Circuit and the Seventh Circuit, or a conflict between either of those courts' decisions and this Court's decision in *ACF*.

The Petition additionally asserts "divergent results" among the district courts following this Court's decision in *ACF* concerning the issue of what constitutes a "generally applicable tax." (Pet., p.12.) This assertion is surprising because the district court decisions cited uniformly found discrimination where railroads were singled out for discriminatory taxation, employing an unusual uniformity of logic and evincing a studied adherence to this Court's ruling in *ACF*.[10]

The case law since this Court's decision in *ACF* is also unanimous in holding that the existence of other victims of discrimination -- usually other utility taxpayers -- does not render the challenged tax "generally applicable." *See, e.g., Ogilvie v. State Board of Equalization*, 893 F.Supp. 882 (D.N.D. 1995); *Burlington Northern Railroad Company v. Huddleston*, Civ. No. 95-8-472 (D.Colo., filed June 30, 1995) (appeal pending) (App. M., p. 123a); *Burlington*

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[10] The extent to which the Petition strains to create a conflict where none exists is exemplified by its discussion of Oregon's exemption for agricultural products. *See* Pet., p.25. The Petition claims that this Court in *ACF* held that no violation of Section 306(1)(d) can result where railroad property is taxed when it would be exempt if owned by a different taxpayer. That issue was not raised, much less decided by the Court in *ACF*. There was no allegation or proof that the plaintiff carlines in *ACF* owned any agricultural products subject to Oregon's exemption. Thus there was no allegation or proof that the exemption was discriminatorily denied to the carlines in *ACF*.

Northern Railroad Co. v. South Dakota Dept. of Revenue, No. 94-3073 (D.S.D., filed June 26, 1995) (App. N., p. 132a). These decisions are totally consistent with each other and with this Court's statement in *ACF* to refrain from deciding the effect of a tax imposed only on railroads "as part of some isolated and targeted group." *See ACF*, 114 S.Ct. at 851. A substantial and unanimous body of case law had dealt with states where railroads were treated as a utility for tax purposes. This class of utility taxpayers, sometimes referred to as centrally assessed taxpayers, has been considered an isolated and targeted group. Both before and after *ACF*, the lower courts have unanimously rejected the defense that railroads may be discriminated against because other utilities are likewise victims of discrimination. *See, e.g., Ogilvie v. State Board of Equalization*, 492 F. Supp. 446, 455 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *Bair, supra*, 766 F.2d at 1224; *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987) (tax on utilities including railroads), *Alabama Great Southern R.Co. v. Eagerton*, 541 F. Supp. 1084, 1087-88 (M.D. Ala. 1982) (license tax imposed on railroads which is higher than license tax on most other commercial and industrial businesses is not permissible despite high license taxes on other utilities); *State of Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 400, 403-04 (9th Cir. 1981) (rejecting argument that railroads may be assessed at the highest assessment classification because airlines, carlines, various mine property, and standing timber is also assessed at highest ratio); *Louisville & Nashville R.R. Co. v. Louisiana Tax Commission*, 498 F. Supp. 418, 421-22 (M.D. La. 1980) (rejecting defense of a discriminatory assessment ratio against railroad property because 231 non-railroads also were discriminated against).

Certainly nothing in the Seventh Circuit's decision breaks this unanimity. In fact, the Seventh Circuit took pains to point out that the application of the Wisconsin tax did not depend on "whether the business which owns the property is locally or centrally assessed." *See* 59 F.3d at 57, n.1. In Iowa, only the intangible assets of centrally assessed taxpayers are taxed. According to unanimous case law, such a tax is prohibited by Section 306(1)(d).

The other issues addressed by the Eighth Circuit on the intangible claim likewise present no question in which any of the lower courts are in conflict. For example, the Petition faults the Eighth Circuit for considering only personal property, and not considering Iowa's taxation of commercial and industrial real property. The Eighth Circuit's analysis, however, is wholly consistent with the extensive and unanimous case precedent -- again left undisturbed in *ACF* -- which holds that real and personal property should be analyzed separately under Section 306 when so treated by the tax system being considered. *See, e.g., Bair, supra*, 766 F.2d at 1225; *ABF Freight System, Inc. v. Tax Division of the Arkansas Public Service Commission*, 787 F.2d 292 (8th Cir. 1986); *Clinchfield Railroad Company v. Lynch*, 700 F.2d 126, 129, n.2 (4th Cir. 1983); *Arkansas-Best Freight System, Inc. v. Lynch*, 723 F.2d 365 (4th Cir. 1983). Nothing in *ACF* overrules this sound precedent, and the Seventh Circuit found it unnecessary to decide the question. *See* 59 F.3d at 58. *ACF* certainly did not hold that the question of "general applicability" must be made in reference to a combination of real and personal property, where real and personal property are treated differently under state law. Rather, *ACF* simply analyzed the case that way based on the Oregon statutes.

The Petition incorrectly cites *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984) for the proposition that the "general applicability" determination must be made under some kind of aggregation of real and personal property in the comparison class. To the contrary, *Lennen* is consistent with the view of the Eighth and Fourth Circuits holding that real property and personal property must be addressed separately where they are assessed differently by state law. The language cited from *Lennen* in the Petition actually rejected the railroad's argument that it should be automatically entitled to relief for personal property discrimination where it shows discrimination as to real property. *See* 732 F.2d at 1501-03.

No conflict among the circuits has developed in the wake of this Court's decision in *ACF*.

B. No Compelling Reason Exists for Granting the Writ.

In addition to the fact that no conflict exists on Petitioner's first issue, no compelling reason exists for granting the writ on that issue. The Petitioner simply seeks to reargue its case once again. Its argument that the Eighth Circuit's decision is wrong simply does not justify review by the Court at this time. Rule 10 clearly provides that an alleged erroneous factual finding or misapplication of a properly stated rule of law does not justify review on a writ of certiorari.

The Petition's insistence that "timely guidance" is needed by the lower courts is incorrect and exaggerated. All courts since this Court's decision in *ACF* have carefully read and applied *ACF*, with remarkably consistent results.

Aside from alleging conflict among the Circuits, the petitioner argues that the Eighth Circuit's decision is contrary to Section 306 and *ACF*. Assuming arguendo that such considerations compel certiorari, the Petition is simply incorrect on both scores.

The Petition challenges the Eighth Circuit's decision for considering untaxed personal property at all, relying on the alleged "plain language mandate" in Section 306(3)(c) defining "commercial and industrial property" as property "subject to a property tax levy."[11] This language is totally irrelevant to the issue here. In *ACF*, this Court discussed whether property was "subject to a property tax levy" only to support a text-based inference that Congress made a choice to allow partial exemptions from a generally applicable tax without subjecting railroad taxes to scrutiny. *See* 114 S.Ct. at 848-49. *ACF* clearly did not rule that courts should determine the generally applicability of taxes by ignoring untaxed property, nor has any lower court so held.[12] *ACF* did not say, as

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[11] As part of its statutory construction argument, the Petition cites an isolated and obscure statement in the legislative history of Section 306, purportedly supporting its mysterious conclusion that "Congress was made aware of the distinction between legislative action and assessing failure as modes which removed property from the rolls." *See* Pet., p.24. Aside from the fact that the quoted legislative history adds nothing to the issues under consideration, this Court has previously cautioned that the language of Section 306, and not its legislative history, is the best guide to Congressional intent. *See Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987); *ACF*, *supra*, 114 S.Ct. at 851.

[12] The Petition's reliance on Section 306(2)(e) to support its "textual analysis" (Pet., p.23) is wholly misplaced. Section 306(2)(e) applies solely to claims under Section 306(1)(a) where the plaintiffs are relying on a sales assessment ratio study to prove discrimination.

suggested by the Petition, that the "comparison class" for claims under Section 306(1)(a) is also the "comparison class" for claims under Section 306(1)(d). Carried to its ultimate conclusion, such an argument would be inconsistent with *ACF*'s explicit reservation that where railroads are singled out for discriminatory treatment, a violation of Section 306(1)(d) may still occur. *See* 114 S.Ct. at 851. It would also render Section 306(1)(d) completely meaningless, which is a result to be avoided in construing statutes. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

As has already been pointed out earlier in this Response, this record does not contain the necessary findings of fact and development of assessment and tax data to allow the type of analysis urged by the Petition. In addition, Iowa's property tax system is again in a state of flux in view of the pending phase-out of taxes on all remaining non-utility personal property. *See* footnote 7, *supra*. If in fact the lower courts need guidance in judging whether a challenged tax is generally applicable, this Court should instruct the lower courts only when provided with an adequate factual record in a future case.

The Petition's attempt to invoke principles of federalism as grounds for reviewing this decision is a desperate attempt to trivialize federalism by invoking it as a call to reverse any federal court decision voiding a state tax practice. The role of federalism under Section 306 has been established by this Court's decisions in *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481

That section has nothing to do with exempt property or the issues in this case.

U.S. 454 (1987) and *ACF*. Where the language of Section 306 "plainly declares the congressional purpose," the federal courts are not free to weigh the considerations of federal interference. *See Oklahoma Tax Commission, supra,* 481 U.S. at 461, 464. Pre-emption displaces state law where the clear and manifest purpose of Congress so provides. *See ACF, supra,* 114 S.Ct. at 851. As the lower courts have correctly held, a tax which singles out railroads for a discriminatory tax clearly violates Congress' clear and manifest prohibition in Section 306(1)(d) of "any other tax which results in discriminatory treatment" of a railroad.

Finally, no compelling reason exists to review this case on the ground that the holding is grossly in error. To the contrary, the result of Section 306 relief in Iowa has been to give Burlington Northern equal treatment under Iowa's specific tax system -- no more and no less. The Petition does not attempt to dispute this equality. Rather, the Petition argues that Section 306 no longer requires equal treatment between railroad property and other commercial and industrial property because of *ACF*. The Eighth Circuit correctly rejected this argument, concluding that BN's challenge to Iowa's taxation of BN's intangible assets did not present issues of "exemption" discrimination at all, and thus *ACF*'s holding was inapposite. The Petitioner's arguments presented here that a failure to tax non-railroad personal property is the equivalent of granting exemptions from an otherwise generally applicable tax was considered by the Eighth Circuit and correctly determined to be "specious" in light of the uncontrovertible fact that Iowa had repealed its tax on personal property. The Petitioner, in the face of Iowa's statutory language, argued that because all "exempt" property is "untaxed," that, conversely, "untaxed" property

must be "exempt." The Eighth Circuit below considered this argument and correctly rejected it.

Because this is not an exemption case, the Eighth Circuit had no occasion to apply this Court's exemption holdings in *ACF*. Nevertheless, the Eighth Circuit addressed the issue whether Iowa's tax on railroad intangibles is a generally applicable tax or is instead a tax which singles out railroads for discrimination in view of *ACF*'s overall rationale. Its conclusion that *ACF* does not countenance the taxation of railroad intangible personal property in Iowa was clearly correct.

Now, for the first time, the Petitioner attempts to paint a new face on its argument by claiming that the "removal" of all personal property from the tax base is the equivalent of granting specific exemptions from a generally applicable personal property tax. These purely semantical tactics are as "specious" as the arguments made to the Eighth Circuit, and in any event should not be considered initially on certiorari. Whatever merit may lay in the Petitioner's distinctions should be reviewed by this Court only after consideration by, and conflict among, the lower courts.

Therefore, no compelling reason exists to grant certiorari on the Petitioner's first issue.

II. NO GROUNDS EXIST TO REVIEW THE EIGHTH CIRCUIT'S RULING CONCERNING THE BURDEN OF PROOF.

A. No Conflict Among the Circuits is Presented by the Record Here.

The Petition attempts to assert a conflict on the burden of proof applicable in valuation cases under Section 306(1)(a). There has been some inconsistency, but no conflict is presented by the record in this case.

The Eighth Circuit and the Tenth Circuit have correctly held that the burden of proof applicable to determinations of valuation under Section 306(1)(a) is governed by state law, and is the state law burden of proof "generally applicable to civil proceedings" (Pet. 9a.) *See also Bair I, supra*, 766 F.2d at 1226; *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1500 n.4 (10th Cir. 1984). State law is required to be applied by Section 306(2)(d) ("the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State Law").

The Petitioner urges that a different state law burden should be applied and cites *Burlington Northern R. Co. v. Department of Revenue, State of Washington*, 23 F.3d 239 (9th Cir. 1994) (hereinafter "Washington") for the proposition that the correct rule is "the burden that would be applied in an ad valorem property tax trial under state law." (Pet., pp.12-13) More specifically, the Petitioner urged below that a "clear and convincing evidence" burden of proof applies in an Iowa case because that is the test which he claims is to be applied in Iowa to appeals of

central assessments of railroads and other utilities. (Pet., 9a.) In *Washington*, the Ninth Circuit applied the burden of proof applicable to taxpayers generally in a property tax case. Here, the Petitioner argues for a special burden of proof he claims is applicable in appeals by utilities and railroads in state court.

Although the cited Ninth Circuit ruling may diverge from the standard applied by the Eighth Circuit and the Tenth Circuit, this case does not present a sharply defined conflict worthy of consideration by certiorari for several reasons.

First, although the Ninth Circuit, unlike the Eighth and Tenth, has not applied the general state law burden of a civil case to Section 306, the Ninth Circuit does not clearly articulate a test or a rationale for a test. Rather, the court resolved the case before it by referring to a state statute which was generally applicable to court review of property tax assessments (RCW 84.40.0301(1)). No reference was made to any other case law, or to any other contrary circuit view. Any conflict with other circuits must therefore be deduced from the result, and is not made explicit by a clearly articulated rationale.

Second, the result in this case would not change even if a Ninth Circuit-style analysis is applied. This is because Iowa, unlike Washington,[13] applies a burden of

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[13] At the time of the Ninth Circuit decision, all property tax cases in Washington, regardless of the taxpayer, were decided with a presumption of validity of the assessment under a "clear, cogent and convincing" standard. This state law has since been called into question by the Washington Supreme Court. *See* discussion at pp. 25-26, *infra*.

proof on taxpayers in property tax cases which is the same as the burden in a general civil case. *See* Section 441.39, Iowa Code; *Bartlett & Company Grain v. Board of Review*, 253 N.W.2d 86, 88 (Iowa 1977) ("Taxpayers initially have the burden of persuasion by preponderance of the evidence.") Indeed, in *Bair I*, the Eighth Circuit referred both to the Tenth Circuit test, and the Iowa law governing taxpayer appeals. *See* 766 F.2d at 1226. Thus, the facts of this case do not present a situation in which the results in the Ninth Circuit and the Eighth Circuit would differ.

Third, no court has ever applied a burden of proof derived from the limited remedies available to centrally assessed utilities and railroads, such as the Petitioner argues in this case. On two separate occasions, the Eighth Circuit has rejected the Petitioner's specific argument that a "clear and convincing" standard, such is claimed to be utilized in Iowa in a narrow range of cases dealing only with centrally assessed taxpayers, should be used. (Pet., p.9.) *See also Bair I*, 766 F.2d at 1226). The Ninth Circuit certainly did not apply the discriminatory test which is urged by the Petitioner here.

Thus, although the result in the Ninth Circuit in one case varied from the Tenth and Eighth Circuit standard, a well defined conflict situation is not created by the record in this case and any appearance of a conflict is illusory.

The Court will not be presented with an actual conflict on the issue presented by the Petition until some Circuit other than the Eighth Circuit must choose between the burden of proof applied to locally assessed taxpayers and a more stringent burden on centrally assessed

taxpayers, and chooses the latter in conflict with *Bair*. So far, this conflict has not arisen.

B. No Compelling Reason Exists to Review the Burden of Proof Issue.

The Petition argues that holding that the "applicable" burden of proof coincides with the general civil burden of proof renders Congress' use of the word "applicable" as superfluous because lack of Congressional action "would have incorporated the identical federal general civil burden of proof -- a preponderance of the evidence." *See* Pet., p.26. The Petition cites no authority for this assertion, and as a matter of federal jurisprudence, it is incorrect.[14] Lack of Congressional language would have left the federal district courts the leeway to develop an approach insensitive to state procedures, a result which Congress may well have rejected. A specific federal statutory direction to incorporate state law on the burden of proof cannot be deemed trivial, even if it results in adoption of the commonly applicable preponderance standard.

Review of the "burden of proof" issue would also be unwarranted here due to the fact that the state statute involved in the Ninth Circuit case has now been interpreted by the Washington Supreme Court to impose

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[14] The allocation of the burden of proof can be a complicated decision rooted in considerations of substantive law and non-evidentiary doctrines. *See* 21 Wright & Graham, *Federal Practice and Procedure*, § 5122, pp. 555-56 (1977). Therefore, the Petitioner's glib assumption that the burden of proof automatically defaults to a preponderance of the evidence standard in the absence of Congressional direction is erroneous.

only a preponderance of the evidence burden on all taxpayers, including centrally assessed taxpayers, in certain situations. *See Weyerhaeuser Company v. Easter*, 126 Wash. 2d 370, 894 P.2d 1290 (1995). In addition, Iowa has arguably repealed the "clear and convincing" burden of proof on centrally-assessed taxpayers, thereby alleviating any discriminatory burden of proof rules in Iowa. *See* Chapter 429, Iowa Code (1995). Suffice it to say at this point that both Washington and Iowa law are in a state of flux at this time. This Court should be reluctant to review a case where changes in state law may moot similar controversies in the future. *See, e.g, Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Therefore, no compelling reason exists to review the burden of proof issue.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The lower courts all have consistently applied *ACF* and no conflicts have appeared. The Petition does not present any ground for granting certiorari within the meaning of Rule 10 of this Court and should be denied.

Respectfully submitted,

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